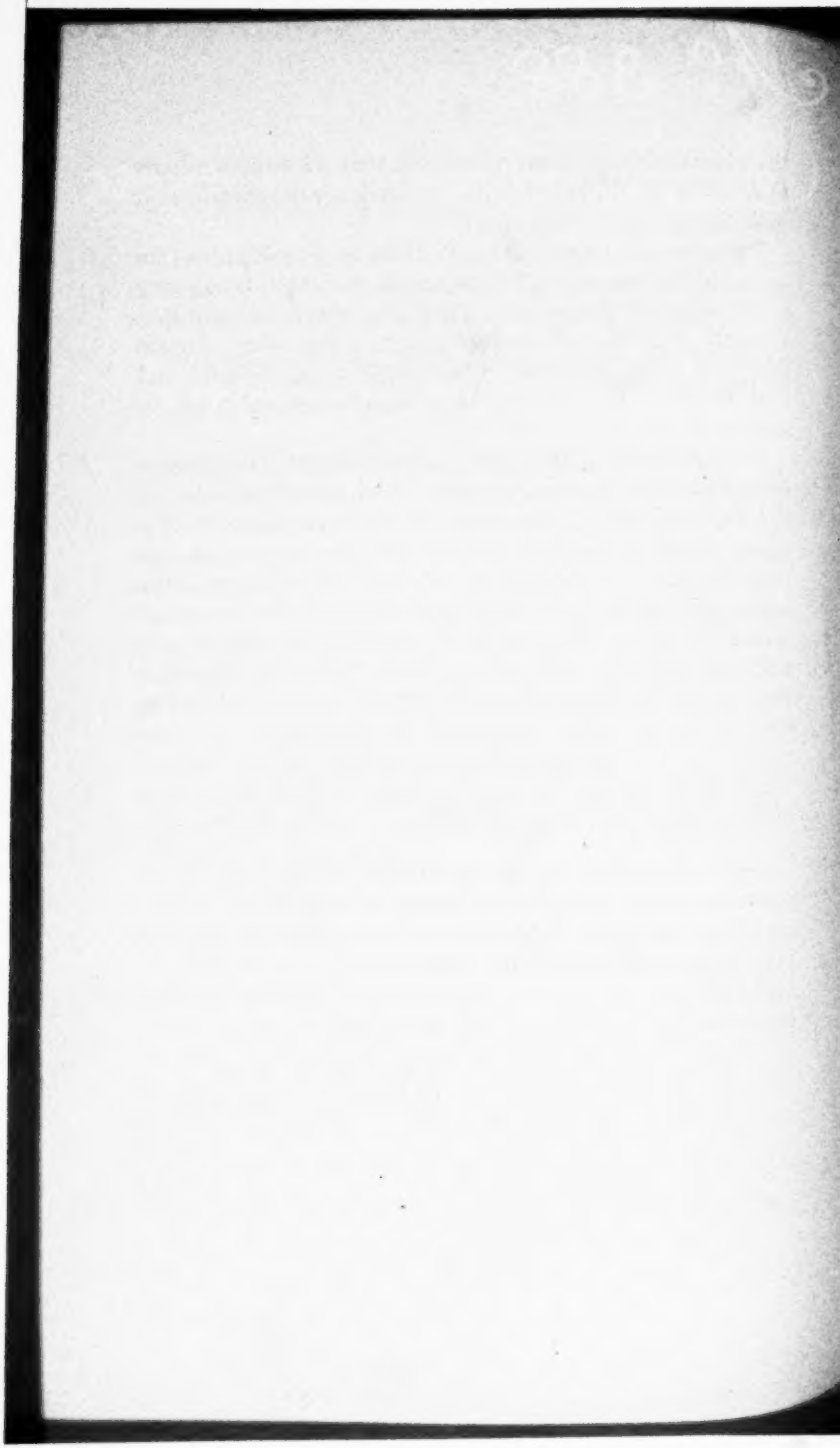

No. 388.

FEB 6 1902
JAMES H. McKENNEY,
Clerk.

Brief of Ford for Appts.

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Feb. 6, 1902.

N. O. MURPHY, C. H. AKERS AND J. W. VICKERS, AND N. O. MURPHY, GOVERNOR; C. H. AKERS, SECRETARY, AND J. W. VICKERS, AUDITOR OF THE TERRITORY OF ARIZONA, CONSTITUTING THE BOARD OF COMMISSIONERS STYLED THE LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA, APPELLANTS,

v.

JAMES L. UTTER AND GEORGE ALBRIGHT, WESLEY ALBRIGHT, AND WILLIAM H. McGINNIS, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF ELIZABETH B. VOORHIES, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

STATEMENT OF THE CASE, POINTS AND AUTHORITIES, BRIEF AND ARGUMENT FOR APPELLANTS.

ROCHESTER FORD,
Of Counsel for Appellants.

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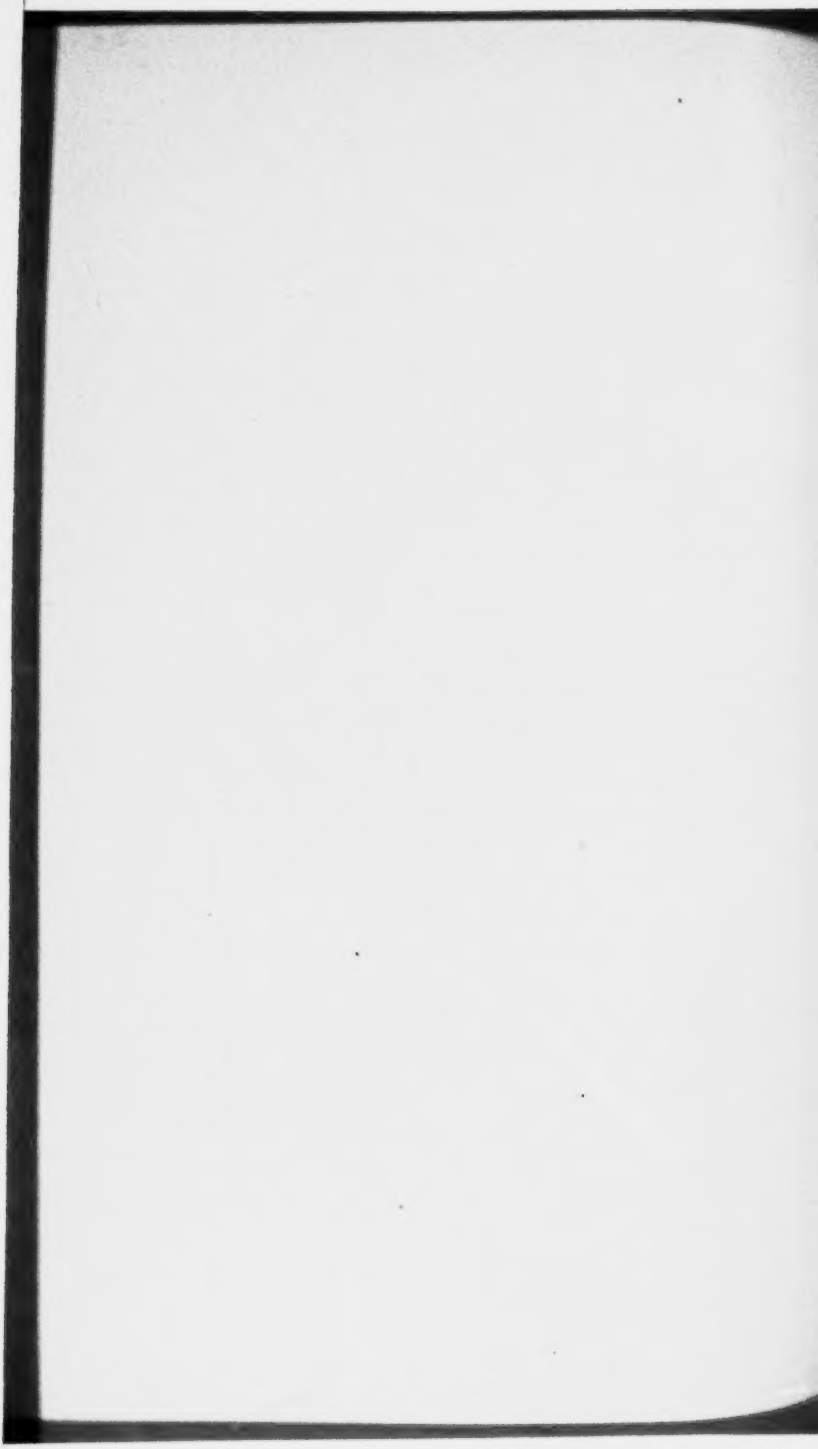

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APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

Statement of the Case, Points and Authorities, Brief and Argument for Appellants.

STATEMENT OF THE CASE.

This case was before this court under the style of Utter *et al.*, appellants, *v.* Franklin *et al.*, as reported in 172 U. S.

416. The statement of the case as therein given by Mr. Justice Brown is as follows:

"This was a petition for a writ of mandamus to compel the defendants, who were respectively governor, auditor, and secretary of the Territory, acting as loan commissioners, to issue certain bonds in exchange for bonds issued by the county of Pima in aid of the Arizona Narrow Gauge Railroad Company.

"The petition set forth that plaintiffs were the *bona fide* holders for value of certain seven per cent. bonds and coupons issued in July, 1883, in compliance with an act of the Territory 'to promote the construction of a railroad,' approved February 21, 1883, aggregating, including principal and interest thereon, the sum of $289,964.50. There was a further allegation in the petition that it was the duty of the defendants to provide for the redeeming of such indebtedness and to issue refunding bonds therefor; that plaintiffs had made demands for the same, which defendants had refused.

"Defendants demurred to the petition, and for answer thereto averred that the bonds now held by the plaintiffs had been declared both by the supreme court of the Territory and by this court to be void, and therefore the petition of the relators should be dismissed.

"The petition being denied by the supreme court of Arizona, the relators appealed to this court. No opinion was filed in the supreme court of the Territory."

After the case was remanded to the supreme court of Arizona respondents, by leave of court, filed their amended return (rec., pp. 8–21). This return alleged (p. 9) that the bonds and coupons sought to be funded herein were never delivered by any one who was authorized by Pima county to do so; that said county never acknowledged the validity of said bonds and never paid any interest thereon; that the bonds and coupons were designed and intended by the legislature of Arizona to promote the construction of a certain railroad from Tucson, Arizona, to Globe, Arizona, but that said railroad was never constructed, equipped, or operated;

that for said bonds said Pima county received no consideration whatever; that the said bonds had been declared void by the supreme court of Arizona and the Supreme Court of the United States in the case of Lewis *v.* Pima County, 155 U. S., 54; that petitioners are not innocent holders of said bonds and coupons or of any thereof; that said bonds and coupons were "not sold or exchanged in good faith and in compliance with the act of the legislature by which they were authorized;" that the said bonds and coupons were not intended to be included and were not included in the act of Congress of June 6, 1896, or any enactment or memorial of the Legislative Assembly of the Territory of Arizona.

Said return contained the further averments as follows (rec., pp. 16–20):

VI.

And respondents for a further return allege: That all of said coupons attached to said bonds that matured and became due and payable more than five years next previous to the commencement of this action are barred by the statute of limitations in such case made and provided, and as to such coupons, and each thereof, your respondents hereby plead such statute of limitations hereto and in bar thereof.

VII.

And for a further return your respondents allege: That the said defendants, nor any nor either of them do now constitute the loan commission of the Territory of Arizona; that the said B. J. Franklin has long since departed this life, that the said C. M. Bruce is now a resident of the city of San Francisco in the State of California and that the said C. P. Leitch is not now, nor has been for more than a year last past, the auditor of said Territory; that said petition for a mandate asks that said mandate shall go against said B. J. Franklin, the said C. P. Leitch and the said C. M. Bruce in their individual capacity, and as members of the loan commission of said Territory; and for the reasons aforesaid, said individuals have not now the legal authority, nor power, to obey any mandate to them issued.

VIII.

And for a further return respondents allege: That the Twentieth Legislative Assembly of the Territory of Arizona, by an enactment duly passed, did repeal the loan commission of the Territory of Arizona, and that thereafter no loan commission exists, nor does now exist, and there is now no power in the Territory of Arizona, whereby said bonds can be funded, and that by reason of the premises the said petitioners are relegated to their action at law on said bonds.

IX.

And for a further return these respondents allege: That the said Pima county does not wish to fund said bonds and coupons, nor any thereof; and for the reason that if said bonds are funded, a new contract is thereby created, wherein and whereby said alleged indebtedness will not mature for fifty years next ensuing; and that said county, while your respondents constituted the loan commission of the Territory of Arizona, did officially notify said loan commission that it would not enter into such new contract, and would not consent to the funding of the said bonds, and did instruct said loan commission not to fund said bonds, and for the reason that, in funding said bonds, a new contract would be made to which said Pima county was not a party and would not be a party.

X.

And for a further return respondents allege: That none of the bonds and coupons claimed to be owned by plaintiffs or either of them were sold or exchanged in good faith in accordance with the act of the Territory of Arizona under which they were issued, and defendants deny that plaintiffs, or either of them are holders or owners, in good faith, and for a valuable consideration before maturity and without notice of any of said bonds or coupons.

XI.

And defendants further aver that heretofore, to wit, on November 23, 1882, the Arizona Narrow Gauge Railroad

Company filed its original articles of association in the office of the secretary of the Territory of Arizona; that said articles were under the provisions of the laws of Arizona Territory, relative to the incorporation of railroad companies, and that such articles contained, among other things the following statements and recitals:

"We, the undersigned residents of the Territory of Arizona, have subscribed and do hereby subscribe the number of shares and the sums representing the value thereof placed opposite our names hereunder to the capital stock of a corporation to be formed under the provisions of the general railroad and corporation act of Arizona Territory, approved February 14th, 1879, for the purpose of constructing, owning and maintaining railroads between the termini and over the route described as follows:

"The line begins at Tucson, Pima county, Territory of Arizona; thence, by the most favorable route in a northerly direction to a pass through the Tortilita mountains; thence in a northerly direction along the San Pedro river to its mouth; thence in a northeasterly direction along the Gila River valley to San Carlos; thence in a northerly direction to the San Carlos River valley; thence in a northeasterly direction along the western slope of the White mountains to Fort Apache; thence in a northeasterly direction to the thirty-fifth parallel of north latitude; all of said line passing into and through the counties of Pima, Pinal, Graham, Gila, and Apache, of the Territory of Arizona, and the aggregate length of said railroad being about two hundred and ten miles."

That in said articles of incorporation were the subscriptions of eleven persons each in the amount of twenty thousand dollars to the capital stock of said proposed railroad, and that said articles also contain the following:

Estimate of actual cost of constructing a railroad of three-feet gauge along the line set forth in the foregoing articles of association, together with the cost of right of way, motive power, depots and stations, rolling stock, and other appurtenances and things for the completion and running of the road.

"*Estimate per Mile.*

"Right of way, station grounds and buildings	$300.00
"Motive power	250.00
"Cars of all kinds	210.00
"Rails, fastenings, and track-laying	6,300.00
"Ties, 2,640 per mile	1,300.00
"Grading and bridging	5,100.00
"Incidental and miscellaneous	400.00
"Total cost per mile	$13,860.00
"Total cost of 210 miles	$2,910,600.00

"I, John P. Culver, hereby certify that I am a civil engineer by occupation and profession; that I have had examined the line of the road hereinbefore proposed and set forth, and have estimated the actual contemplated cost of construction of said road, together with the cost of right of way, motive power, and every other appurtenance and thing for the completion and running of said road, and the actual contemplated cost, as nearly as can be estimated, is the sum of $2,910,600.

"JNO. P. CULVER."

Defendants further aver that the said Arizona Narrow Gauge Railroad Company was the same Arizona Narrow Gauge Railroad Company referred to in act No. 35 of the Twelfth Legislative Assembly of the Territory of Arizona, entitled "An act to promote the construction of a certain railroad."

XII.

Defendants further aver that before the time when any bonds of Pima county could lawfully be exchanged in good faith under the provisions of said act number 35, the bonds of Pima county being the same bonds claimed to be owned by plaintiffs herein, were by the agents of said Arizona

Narrow Gauge Railroad Company wrongfully and without the order or consent of the board of supervisors of Pima county, abstracted from the possession of the treasurer of Pima county, who was holding said bonds and all of them for safe keeping until a time when said bonds could lawfully and in good faith be delivered and exchanged, and that in lieu of said Pima county bonds one hundred and fifty bonds of the Arizona Narrow Gauge Railroad Company, each payable to Pima county or bearer, each in the sum of one thousand dollars, each dated ——, 1883, and each having interest coupons payable semi-annually attached thereto, were left in the office of said treasurer of Pima county; and defendants further aver that said bonds of said Arizona Narrow Gauge Railroad Company are identical in amount, date and time of payment of principal and coupons with the bonds of Pima county claimed to be owned by plaintiffs herein.

XIII.

Defendants further aver that said Arizona Narrow Gauge Railroad Company is, and at all the times herein mentioned, was insolvent, and that the said company never built or operated any part of the railroad proposed to be built and operated according to its said articles of incorporation, or any railroad whatever, and that immediately after coming into possession of the bonds of Pima county claimed to be owned by plaintiffs herein it ceased all operations and business and pretense of doing business, and defendants aver that the bonds and coupons and all of them of said Arizona Narrow Gauge Railroad Company are and at all times have been worthless and without any value whatever, that immediately upon being informed of the fact that the bonds of Pima county had come into the possession of the said railroad company the board of supervisors of Pima county used all the efforts within their power to recover possession of said bonds, and declined and refused to pay any interest on same and that no interest on said bonds was ever paid by said Pima county, and that said Arizona Narrow Gauge Railroad Company cannot now and never could perform its obligation to build said railroad or any part of it, and defendants aver that there is a total want of consideration for the said bonds and coupons and all of them claimed to be owned by plain-

tiffs herein, and a total failure of the consideration for said bonds and coupons and all of them.

XIV.

Defendants further aver that none of the said bonds and coupons of Pima county were negotiated or transferred by said Arizona Narrow Gauge Railroad Company till many years after the said railroad company had ceased to do any business of any sort and many years after the consideration for the bonds of said Pima county had wholly failed as aforesaid, and defendants aver that the original transferees of said bonds and coupons and all subsequent holders thereof and the plaintiffs and each of them herein had notice and knowledge prior to any transfer of said bonds and coupons of said Arizona Narrow Gauge Railroad Company of the purported consideration of said bonds and of the insolvency of said railroad company and of the fact that it had not built and could not build the said railroad or any part thereof proposed by it to be built, and of the fact that the purpose of building said railroad had long prior thereto been abandoned and that all said transferees and holders of said bonds and coupons of said Pima county had notice and knowledge prior to any such transfer of same of the want of consideration and total failure of consideration of all of said bonds and coupons and knowledge and notice prior to any transfer of said bonds and coupons of all the facts herein set out and alleged.

XVI.

Defendants further aver that the cause of action on the coupons claimed to be owned by plaintiffs herein was not commenced and prosecuted within five years after the cause of action accrued, and defendants plead the statute of limitations of the Territory of Arizona, to wit, paragraph 2314, and the amendments thereto of the Revised Statutes of the Territory of Arizona, 1887.

XVII.

And for a further defense thereto defendants plead as a counter-claim or set-off the said bonds and coupons of the said Arizona Narrow Gauge Railroad Company hereinbefore

set out and described, and defendants aver that none of the said bonds or coupons have been paid, but that the same and all thereof are now due the said Pima county, so far as the same have matured and are unpaid.

Petitioners filed an amended reply (rec., pp. 50–64) denying the allegations of the amended return and averring that the facts set up therein constitute no defense to this case. Paragraph IX of said reply is as follows:

"IX

"As to subdivision VIII of said answer the petitioners deny the allegations of said answer that the said legislature of the Territory of Arizona repealed the loan commission of Arizona and that the loan commission no longer exists; and petitioners allege that the legislature of the Territory of Arizona had no power to repeal the same, and that any attempt to do so is void and of no force and effect."

The findings of fact in the nature of a special verdict (rec., pp. 91–109) show that:

I.

That the Arizona Narrow Gauge Railroad Company, mentioned in the act of the legislature of the Territory of Arizona approved February 21, 1883, entitled "An act to promote the construction of a certain railroad," filed its articles of association with the secretary of the said Territory on the 23d day of November, 1882, which articles specified that the undersigned subscribed to the shares opposite their names to the capital stock of the corporation, under the general railroad act of the Territory of February 14, 1879, for the purpose of constructing, owning, and maintaining railroads, the line to begin at Tucson, Arizona, thence by the most favorable route in a northerly direction along the San Pedro river to its mouth; thence in a northeasterly direction along the Gila river to San Carlos; thence

in a northerly direction to the San Carlos river; thence northeasterly to Fort Apache; thence northeasterly to the thirty-fifth parallel, passing into and through the counties of Pima, Pinal, Graham, Gila, and Apache; signed by eleven persons, each subscribing two hundred shares, of the value of $2,000; which articles are in words and figures as follows, to wit:

"We, the undersigned, residents of the Territory of Arizona, have subscribed and do hereby subscribe the number of shares and the sums representing the value thereof placed opposite our names hereunder to the capital stock of a corporation to be formed under the provisions of the general railroad incorporation act of Arizona Territory, approved February fourteenth, 1879, for the purpose of constructing, owning and maintaining railroads, between the termini and over the route described as follows:

"1. The line begins at Tucson, Pima county, Territory of Arizona, thence by the most favorable route in a northerly direction to a pass through the Tortilita mountains, thence in a northerly direction along the San Pedro river to its mouth; thence in a northeasterly direction along the Gila River valley to San Carlos; thence in a northerly direction to the San Carlos River valley; thence in a northeasterly direction along the western slope of the White mountains to Fort Apache; thence in a northeasterly direction to the thirty-fifth (35th) parallel of north latitude, all of said line passing into and through the counties of Pima, Pinal, Graham, Gila and Apache of the Territory of Arizona, and the aggregate length of said road being about two hundred and ten miles."

Article III of the articles of incorporation of the railroad company is as follows:

"The amount of the capital stock of this corporation shall be three million dollars, which shall be divided into thirty thousand shares of one hundred dollars each, which sum is the actual contemplated cost of constructing the road herein proposed to be constructed, together with the cost of the right of way, motive power and every other appurtenance and thing for the completion and running of said road as

nearly as can be estimated by John P. Culver of Tucson, Arizona Territory, a competent engineer, whose estimate and report is annexed hereto and made a part hereof."

The act of the Territory approved February 21, 1883, and an act supplemental thereto approved March 6, 1883, are set out in full in the appendix to this brief.

It appears from the fourth finding of fact (rec., p. 95) that when application was made by the Arizona Narrow Gauge Railroad Company to the board of supervisors of Pima county for the first $50,000 of bonds, the following resolution was offered by one of the supervisors:

"Ordered, that the board, having duly considered the application of the Narrow Gauge Railroad Company for an exchange of $200,000 of bonds, and being of the opinion that the said railroad company is not in position to give any guarantee that they intend in good faith to build said road; it is ordered that until said company do some act in accordance with the provisions of the law under which they ask an exchange of bonds, their application be refused and denied."

This motion was not carried, and the following resolution was passed:

"Ordered, $200,000 of the bonds of the county of Pima drawn in accordance with an act of the Legislative Assembly of the Territory of Arizona, entitled 'An act to promote the construction of a certain railroad,' approved the 21st day of February, A. D. 1883, be issued, and that the same be placed in the hands of the county treasurer upon the Narrow Gauge Railroad Company giving bonds to the county of Pima in the sum of five hundred dollars, conditioned that if the above bonds are not exchanged in accordance with the provisions of said act for the bonds of the above-named railroad, that said company will repay the said county of Pima all expenses incurred in the issuance of said bonds; the bond to be approved by the board after submission to the district attorney as to form."

It further appears from the said findings that other proceedings were as follows:

"That on June 16, 1884, there was entered in the minutes of the said board of supervisors of Pima county, the following: Ordered that the chairman of the board be authorized when he shall deem it expedient, to institute proceedings for the recovery of the county bonds issued to the Arizona Narrow Gauge Railroad Company, and to stop the payment of the interest thereon. That on said June 16, 1884, there was filed in the office of the clerk of the board of supervisors of said Pima county, Arizona, a paper signed William C. Davis, president of the A. & G. R. R. Co., and attested C. C. Stevens, secretary, and addressed to the board of supervisors of said county as follows: 'The A. & G. R. R. Co. by its president, W. C. Davis, hereby offers for reasons that are obvious and well understood by your honorable board, to the supervisors of Pima county, $50,000 of Pima county bonds now held by said corporation and accept in full payment therefor, Pima county warrants of the face value to the amount of $22,500 and the corporation bonds heretofore exchanged for said county bonds. This sum of $22,500 is about $1,000 less than the actual *bona fide* expenses of the said corporation in the construction of the said road to date.' That there was filed on the same day with the said clerk and signed by the same man as president of the said railroad company, and addressed to the board of supervisors of Pima county, a paper to the effect that the said railroad company 'hereby offers to release the county of Pima from all obligations to said Arizona Narrow Gauge Railroad Company under an act of the legislature of Arizona, approved February 21, 1883. The said railroad company hereby offers and proposes to return to the supervisors of the said county of Pima $50,000 in bonds of said county issued to said company by said supervisors under said act, and release said county from the transfer of their bonds with said company under and by virtue of the above-mentioned act. The reasons of the proposed release of the said county are inability of the said company to dispose of said bonds in the amount of $50,000 advantageously and to the benefit of the said company, greater than the consideration hereinafter mentioned, as a consideration asked from the said county of Pima for the above-mentioned re-

lease and retransfer of the said bonds of the said county. The said company proposes and offers to release the said county as aforesaid and retransfer to the said county the $50,000 in bonds of said county upon the said board of supervisors returning to the said company the $50,000 of bonds of said company now held by the said board of supervisors, and the further consideration of the issuance to the said railroad company by the board of supervisors of warrants of the said county of Pima in the amount of $18,500.' That on November 7, 1884, the following minute entry appears in the proceedings of the said board of supervisors: 'Ordered, all members voting "aye" that the county treasurer be instructed not to pay any interest on the bonds issued by the county to the Arizona Narrow Gauge Railroad Company until he receive the further order of the board, and that the clerk transmit a copy of this order to the treasurer."

The fifth finding of fact is as follows:

V.

That there is no evidence in the records of the board of supervisors or the office of the treasurer of said Pima county how the first $50,000 of bonds came into the possession of the Arizona Narrow Gauge Railroad Company. That the incorporators of the said railroad company had no way in which they could reasonably count on having this road built that they had no funds promised or secured with which to complete the road at the time and no arrangement with any capitalists or syndicate by which the money was to be furnished to complete the road; that they did not expect to put in the money themselves and had no idea where they were to get it. That the company in 1883 had graded about five and a half or six miles and had purchased ties and timber for bridges, but had no rails on the part graded. That the company suspended work in 1883 and that work was not resumed till about August 1886. That the company had made an offer to sell the first $50,000 of bonds of Pima county, and almost everybody in the company tried to sell them. That the treasurer of the company was one B. M. Jacobs, a banker in the city of Tucson, Arizona, and that he had tried through the usual channels to place the

bonds in New York, San Francisco and other places, and could not find any purchasers. That the company sent an attorney East to negotiate the bonds, but he was not able to do so; that the treasurer of the railroad company made several applications to the treasurer of Pima county to pay the interest on these bonds but he refused to pay any interest, and the railroad company never received any money from the county treasurer or from anybody else on these bonds. That there were past-due coupons on the bonds of Pima county in 1886 when the first $50,000 of bonds were turned over to one W. W. Walker, who was an agent of Coler & Co., and that no interest had been paid on the bonds.

Afterwards two installments of $50,000 each of bonds of Pima county were delivered, and the findings state that (rec., p. 99):

"It is further found as a matter of fact that no more than ten or ten and one-half miles of the said road have ever been laid with ties and iron, and that no work was ever done on the said road except to lay ten miles with ties and iron, as above stated, and grade about twenty miles additional. It is also further found as a matter of fact that no passenger or freight trains were ever run over said road, and that after the delivery of the third $50,000 of said Pima County bonds, all work and operations on said road were abandoned and never resumed. That the ten miles out of Tucson which were laid with ties and iron were (not) ballasted except for a very little bit of the way. That the road was not very well graded and was not a well-made road. The earth was thrown up loose. It was a light sandy loan (loam) and did not hold. There was a certain grade for two or three hundred feet, and then there would be another grade and then at the end of that another grade."

The remaining findings of fact, omitting details of numbers of bonds and names of holders, are as follows:

VIII.

That the original stockholders of the road were not able to continue work on it after the grading done in 1883, and

suspended all operations after that time. That in March, 1886, these original stockholders turned over all the assets of the road to one W. W. Walker, on his agreement to complete the road in accordance with the said act of the legislature of the Territory of Arizona, approved February 21, 1883, entitled "An act to promote the construction of a certain railroad," and in accordance with the original intent of the company; that said W. W. Walker and his associates, Coler & Co., who were a firm of bankers and brokers of New York city, took the stock of said Arizona Narrow Gauge railroad and elected a new board of directors and new officers; that said W. W. Walker did not have sufficient means to build thirty miles of the said railroad and that Coler & Co. knew this fact; that said Walker was the representative and agent of said Coler & Co.; that Coler & Co. became stockholders of the Arizona Narrow Gauge Railroad Company on August 9, 1886, receiving one-third of the stock; that all the money for the building of the said ten miles and the grading of the twenty miles additional, amounting to $52,900.42, was transmitted by Coler & Co. to the Bank of Tucson for the credit of W. W. Walker, agent, and was all expended under the supervision and orders of one C. S. Coler, who was a nephew of W. N. Coler, and who was sent from the East to represent said W. N. Coler and to act as cashier and to sign all checks for all funds paid out in the construction of the said road. That said Coler & Co. made a contract with W. W. Walker in which Coler & Co. agreed to finance and build the first thirty miles of the said road and to pay over moneys as needed for construction expenses, but that after Coler & Co. had received $150,000 of Pima County bonds, being the 150 bonds involved in these mandamus proceedings, said Coler & Co. refused to proceed further on the lines originally agreed upon. That the said second and third $50,000 of said Pima County bonds were received from the county treasurer of Pima county by W. H. Culver, who was the president, and Charles E. Walker, who was the secretary, of said Arizona Narrow Gauge Railroad Company, and were by said Charles E. Walker packed, sealed and delivered to the express company for shipment to Coler & Co. in New York, and that the first installment of $50,000 Pima County bonds had been sent to Coler and Co. before May 18, 1886. That Coler & Co. agreed to pay for these bonds the price of 74¼

cents on the dollar and to pay the money over as needed for construction expenses, but Coler & Co. never rendered any account showing the amount of money advanced by them and for what purposes. That before Coler & Co. advanced any moneys in the work done on the ten miles which were laid with ties and iron and the twenty miles which were graded, W. N. Coler came to Tucson in person and investigated the condition of affairs and also sent an agent one J. Alden Gaylord, who in February or March, 1886, went to Globe, Arizona, over the route of the proposed road in order to examine into the feasibility of it and whether it would pay and that said Gaylord on May 11, 1886, wrote to W. N. Coler & Co. that "in accordance with your instructions" he had made a trip to Arizona in March and examined into the "particulars of the issues of $200,000 of bonds to the Arizona Narrow Gauge Railroad Company," and on March 27, 1886, addressed to the chairman of the board of supervisors of Pima county, the following letter:

"NEW YORK, *March* 27, 1886.

"Hon. J. S. MANSFELD,
Tucson, Chairman Board of Supervisors,
Pima County, Arizona Territory.

"MY DEAR SIR: This morning I wired you as follows: 'My report has been favorably considered. Negotiations just closed. Building of your railroad is now a fixed fact. I congratulate you,' all of which I hereby confirm. It gave me equally as much pleasure to send the above as I know it did you to receive it. I have great faith in the almost unbounded resources of your country, and the Narrow Gauge R. R. will be an important factor in developing them. It will in due course bring increased wealth, commerce and population to Tucson and Pima county, if your citizens do their part in encouraging these great commercial blessings, and of that I do not have the slightest doubt. My friends have ample means to build the road up to the 'thirty-mile post,' and it is safe for me to say that the work will be pushed vigorously, and the R. R. will be finished there during the summer. Beyond that point (thirtieth-mile post) you can readily understand that the extensions of it northwards to the mouth of the San Pedro (and still better to catch the immense carrying trade of Globe City) will depend very

largely on the liberality and wisdom of the people of Pinal and Gila counties to grant aid, and see the necessity of doing so promptly, which I feel assured they will do nobly when the proper time arrives. With this object in view, I trust you and the members of the board of supervisors will do all in your power officially and as good citizens to promote and prepare the way for this most important action, which is not only so vitally momentous for the future prosperity of Pinal and Gila, but your own county as well. Possibly I may be offered a directorship in the Narrow Gauge by my friends who are building it, and in that event I may be out and visit your hospitable city this winter coming, or before, and I feel that it almost goes without saying that you will do all you consistently can to assist me in this matter.

"In conclusion, I desire to thank you, the board, and all the citizens of Tucson and Pima for your kindness so cordially extended to me, by one and all, during my recent sojourn, and to assure you that I appreciated it most sincerely, and will never lose an opportunity to tell the truth here in the East (where so much misapprehension seems to exist), about the great resources of your country, as well as the courtesy, honesty and enterprise of its citizens.

"With great respect, I have the honor to be,

"Yours very truly, J. ALDEN GAYLORD."

IX.

That before the second and third delivery of $50,000 each of bonds of Pima county was made to the contractor, Coler & Co. were stockholders of the said Arizona Narrow Gauge Railroad Company and were holding and owning one-third of the stock of said railroad company, and at the time of the delivery of said $100,000 of said bonds the said contractor, one William W. Walker, who was engaged in constructing the said railroad, was the agent of William N. Coler, Sr., who was trading in the name of W. N. Coler & Co. That before the said W. N. Coler & Co. acquired the said bonds, they made inquiries of many persons, business men, officials, and others in Arizona recommending the said bonds, and the said W. N. Coler & Co. were informed in said letters that a road from Tucson to Globe would be a paying enterprise and that if said road were built it would in all probability be a paying investment. And said W. N. Coler & Co. before

the bonds were delivered to them or any moneys had been advanced by them for construction work on the said railroad, were fully informed as to all the facts connected with the issuance of the first $50,000 of bonds, and that the county of Pima had refused to pay interest on same and that the original stockholders of the said Arizona Narrow Gauge Railroad Company were unable to sell the $50,000 of bonds then in the possession of the treasurer of said Arizona Narrow Gauge Railroad Company and that the said company had abandoned the idea of doing any more work on the said railroad. That after the said bonds were delivered to W. N. Coler & Co. he sold the same to various parties at prices ranging from 94 cents on the dollar, to par. That one John Green holder of one of said bonds, Theodore Hill, holder of one of said bonds, Eva May Smith, holder of one of said bonds, Steven Tompkins holder of one of said bonds, and Emma L. Zabriskie, holder of four of said bonds have testified in this case that they bought the same without any knowledge of any defect and that they paid par for said bonds; that as the coupons came due on all of the said $150,000 of bonds and after Pima county had refused to pay any interest on any of said bonds, Coler & Co. advanced to the holders of the coupons on all of said bonds the amount of said coupons as they became due and retained and kept the said coupons and all of them, and that this was continued to the year 1896, and that all of the said coupons sought to be funded in this case are owned by the firm of Coler & Co. That the coupon falling due on July 1, 1887, on the said bonds of Pima county, was sent by Coler & Co. to the treasurer of Pima county for collection, and that the coupons falling due on said date from a number of these bonds were protested July 25, 1887, and the coupons falling due January 1, 1888, were also protested, and that Coler & Co. continued after the protest of said coupons to advance to the holders of the said bonds the amount of all the other coupons as they fell due semi-annually, all of which said coupons were retained and kept by Coler & Co., and are now the property of said firm. That prior to January 1, 1887, the firm of W. N. Coler & Co. was composed of W. N. Coler; that after January 1, 1887, and up to November 1, 1898, it was composed of W. N. Coler, Sr., and W. N. Coler, Jr., and that after November 1, 1898, Mr. Frank W. Coler became a member of the firm. That the said

firm of W. N. Coler & Co. are now the owners and holders of thirty of the said Arizona Narrow Gauge Railroad bonds, numbers 101 to 130 inclusive, and that the same were bought from the executors of one Elizabeth B. Voorhees under the following agreement: "April 11, 1899. Sold to W. N. Coler & Co. at private sale thirty, seven per cent. bonds, par $1,000 each, known as the Arizona Narrow Gauge bonds, being numbers 101 to 130 inclusive, issued by Pima county, Arizona, July, 1883, and repudiated by the county shortly after their issue. They have been the subject of litigation for several years which is still pending. Also five 6% par value $1,000 each, issued by the city of Langton, Elk county, Kansas, being numbers 1 to 5 inclusive, for all of which we received $11,000. Note: The Arizona Narrow Gauge Railroad bonds were in the possession of Coler & C., who claimed a lien upon them for *pro rata* shares of moneys advanced by them and expenses incurred in carrying on the litigation to establish their validity together with other bonds of the same issue. Her *pro rata* share amounted to $14,000. The Pima County bonds were in the actual custody of Coler & Co. April 11, 1899, the date of their sale as heretofore stated in Schedule A. Coler & Co. claimed a lien upon them which amounted to $14,000 or more for expenses of litigation in Arizona and elsewhere;" which agreement was signed and sworn to by the executors of the said Elizabeth B. Voorhees; that the said firm of W. N. Coler & Co. is also the holder and owner of seven more of the said bonds issued by Pima county; that W. N. Coler, Jr., is the holder and owner of sixteen of the said bonds of Pima county, and that when he purchased them he knew that the suit of Charles Edward Lewis *v.* Pima County had been decided by the Supreme Court of the United States, and that at the time of the purchase of the said sixteen bonds by William N. Coler, Jr., there was no market for them owing to the fact that they had been declared invalid in the said suit of Lewis *v.* Pima County. That the North American Loan & Trust Company is the holder and owner of five of said bonds of Pima county, which they acquired by an exchange of other bonds on April 1, 1896; that at such date one Leonard H. Hole, an attorney of law, was the president of said North American Loan & Trust Company, and that said Hole knew of the result of the suit of Charles Edward Lewis against Pima

County shortly after the decision was rendered in said case in 1894, and that on or about April 1, 1896, said Hole knew by report that work had been stopped on the Arizona Narrow Gauge railroad; that James L. Utter, one of the petitioners herein, is engaged in the business of buying and selling municipal bonds, and that he bought certain of these Pima County bonds from Coler & Co. and sold the same to other parties, and that the customers to whom said Utter sold the bonds delivered the coupons to Utter as said coupons fell due, and Utter paid the money on said coupons, and sent said coupons to Coler & Co., and received from Coler & Co. the money on all of said coupons down to about 1895 or 1896.

X.

That some of the purchasers of the said bonds from W. N. Coler & Co. sold and disposed of the same to other persons, and that some time after the passage of the act of Congress of June 6, 1896, the persons who then held all the said $150,000 bonds and coupons pertaining thereto, including among others, Elizabeth B. Voorhees, one of the petitioners in these proceedings, who owned subject to lien of Coler & Co. thirty of the said Pima County bonds, numbers 101 to 130 both inclusive, and James L. Utter, who owned absolutely in his own right four of said bonds, numbers 3, 11, 66 and 40, placed all these 150 bonds and the coupons pertaining thereto in the possession of the firm of W. N. Coler & Co., accompanied by the following written authority, signed by said persons, to wit:

"Messrs. W. N. COLER & Co.,
"New York City.

"GENTLEMEN: We herewith enclose you bonds number — amounting to $—— *will* full authority to deal with them in the same manner as all other bonds of said issue placed in your hands, and with authority to change the form of said indebtedness in such manner as you deem to the best interests of all bondholders, and accept in lieu thereof such new securities as in your judgment may be best, and we also agree to pay our proportional share of any and all expenses incurred by you in connection with this matter, it being understood however that nothing in this shall be construed as an obligation on our part to assume any expense

whatever in the event of your failure to secure a settlement or enforcement of this indebtedness.

"Yours truly, —— ——."

That all the moneys expended in the litigation in Arizona over the coupons of said bonds and the other expenses in connection with efforts to validate these bonds have been advanced solely by Coler & Co. and that the other owners of the bonds never brought any suit on the coupons and never joined in defraying the expenses of any suit.

That bonds 139, 145 inclusive now held by Coler & Co. were acquired by that firm prior to June 6, 1896, at a time when said bonds had no market value, and it is further found that except Elizabeth B. Voorhees, the other owners of these bonds have never been charged with any moneys advanced by Coler & Co. in regard to such bonds or expenses incurred by Coler & Co. in carrying on any litigation.

That W. N. Coler & Co., acting under and pursuant to the said authority transferred and delivered all the said bonds and coupons to James L. Utter and Elizabeth B. Voorhees, and to their attorneys, Leonard H. Hole and Barnes & Martin, in order that the said bonds and coupons might be presented to the board of supervisors of the county of Pima, and to the board of loan commissioners of the Territory of Arizona, for refunding under the provisions of the act of Congress of June 6, 1896. That it was the express understanding that when the said bonds were refunded the new refunding bonds should be delivered to the several holders of the old bonds and coupons *pro rata*, and that the holders of the old bonds and coupons should bear *pro rata* the charges and expenses of such presentation, but that Coler & Co. have advanced all the moneys for expenses connected with all the litigation over these bonds and the holders and owners of the old bonds are not to assume any expense in case the said bonds are not refunded. It was also the express understanding and agreement that the said James L. Utter and Elizabeth B. Voorhees, and their attorneys, had full authority to bring any suit or suits or mandamus proceedings which might be necessary in order to enforce the refunding of said bonds. The said James L. Utter and Elizabeth B. Voorhees expressly assented to this understanding and agreement and trust as to all the bonds and coupons. Pursuant to the said understanding and agree-

ment and trust as to all said bonds, all the said bonds and coupons were forwarded by express to Leonard H. Hole, attorney for said James L. Utter and Elizabeth B. Voorhees, and were by him received and taken to Arizona, and he, together with Barnes & Martin, attorneys-at-law in Arizona, presented said bonds and coupons to the board of supervisors of the county of Pima, and made a demand in writing on the said board of supervisors of said county that they report to the loan commission of the Territory of Arizona the said outstanding bonds and coupons and the indebtedness represented thereby, and that on the said board of supervisors failing to comply with their demands the said Leonard H. Hole and said Barnes & Martin presented the said bonds and coupons to the loan commissioners of the Territory of Arizona and made the demand upon them dated Phœnix, Arizona, December 14, 1896, which is set forth as Exhibit A to the petition in the pleadings in these mandamus proceedings, and on the refusal of the said loan commissioners to issue refunding bonds as demanded, the present mandamus proceedings were, pursuant to said understanding and agreement, begun and instituted in this court on the 31st day of December, 1896. That the said bonds and coupons on which these mandamus proceedings are brought, are as follows, to wit:

(*Form of Bond, Serial Number Omitted.*)

One thousand dollars. $1,000.00.

UNITED STATES OF AMERICA,

Territory of Arizona, County of Pima.

The County of Pima, in the Territory of Arizona, for value received promises to pay to the Arizona Narrow Gauge Railroad Company or bearer at the office of the treasurer of said county, in the city of Tucson, on the first day of July, A. D. one thousand nine hundred and three (1903) the sum of one thousand dollars, in lawful money of the United States, with interest thereon at the rate of seven per cent. per annum. Said interest payable at the office of the treasurer of Pima county, semi-annually, on the first day of January, and first day of July in each year

on presentation and surrender of the interest coupons hereto attached.

This bond is issued by the board of supervisors of said county of Pima under and by virtue of an act of the legislature of Arizona, entitled An act to promote the construction of a certain railroad, passed by the Legislative Assembly of the Territory of Arizona, and approved by the governor thereof the 21st day of February, A. D. 1883; and this bond is one of a series of two hundred issued in pursuance of said act, and exchanged for a like number of bonds of said railroad company of like amounts, bearing like interest, and running like time as the bonds of which this is one.

In witness whereof the said county, by its board of supervisors has caused this bond and the coupons hereto attached, to be signed by the chairman of the board of supervisors, and countersigned by the clerk of said board, and by the county recorder of the county of Pima; and the said clerk has affixed hereto the seal of the said county; and the said recorder has affixed hereto the seal of the said county recorder's office, this first day of July, A. D. 1883.

JAMES H. TOOLE,
Chairman Board of Supervisors.
WILLIAM J. OSBORNE,
Clerk Board of Supervisors.
CHAS. R. DRAKE,
County Recorder.

That petitioners own and hold one hundred and fifty of said bonds, numbered from 1 to 150 both inclusive.

That there are at present attached to each of said 150 bonds seven interest coupons not yet due, numbered 34, 35, 36, 37, 38, 39 and 40, each for the sum of $35.00 and to become due as follows, to wit:

Coupon No. 34, July 1st, 1900.
Coupon " 35, January 1st, 1901.
Coupon " 36, July 1st, 1901.
Coupon " 37, January 1st, 1902.
Coupon " 38, July 1st, 1902.
Coupon " 39, January 1st, 1903.
Coupon " 40, July 1st, 1903.

That the form of each of said coupons, except as to number of bond, number of coupon and date of maturity, is as follows, to wit:

Pima County Bond.

Coupon number —.

On the 1st day of ——, A. D. 1—, the County of Pima in the Territory of Arizona, will pay to the bearer, at the county treasurer's office, at Tucson, thirty-five dollars ($35.00) being interest due on bond numbered —.

JAMES H. TOOLE,
Chairman Board of Supervisors of Pima County.
WILLIAM J. OSBORN,
Clerk Board of Supervisors of Pima County.
CHAS. R. DRAKE,
Recorder of Pima County.

That petitioners also own and hold three thousand eight hundred and ninety-one (3,891) like coupons, each for the sum of $35.00 clipped from said 150 bonds, and being coupons numbered 8 to 33, both inclusive from each of said 150 bonds, and due respectively:

Coupon No. 8, July 1st, 1887.
Coupon " 9, January 1st, 1888.
Coupon " 10, July 1st, 1888.
Coupon " 11, January 1st, 1889.
Coupon " 12, July 1st, 1889.
Coupon " 13, January 1st, 1890.
Coupon " 14, July 1st, 1890.
Coupon " 15, January 1st, 1891.
Coupon " 16, July 1st, 1891.
Coupon " 17, January 1st, 1892.
Coupon " 18, July 1st, 1892.
Coupon " 19, January 1st, 1893.
Coupon " 20, July 1st, 1893.
Coupon " 21, January 1st, 1894.
Coupon " 22, July 1st, 1894.
Coupon " 23, January 1st, 1895.
Coupon " 24, July 1st, 1895.
Coupon " 25, January 1st, 1896.
Coupon " 26, July 1st, 1896.
Coupon " 27, January 1st, 1897.
Coupon " 28, July 1st, 1897.
Coupon " 29, January 1st, 1898.

Coupon No. 30, July 1st, 1898.
Coupon " 31, January 1st, 1899.
Coupon " 32, July 1st, 1899.
Coupon " 33, January 1st, 1900.

Except the following coupons, which are not produced by petitioners, to wit:

Coupons No. 14 from bonds Nos. 84, 85, 86, 88 and 90, due July 1, 1890.
Coupon No. 15 from bond No. 17, due January 1, 1891.
Coupon No. 22 from bond No. 93, due July 1, 1894.
Coupon No. 24 from bond No. 19, due July 1, 1895.
Coupon No. 25 from bond No. 19, due January 1, 1896.

XI.

That after the contract entered into with W. W. Walker and the transfer by the original stockholders of the Arizona Narrow Gauge Railroad Company of all the assets of the company including the first $50,000 of bonds of Pima county, there was no money in the treasury of the said Arizona Narrow Gauge Railroad Company, and the moneys for the work done on the said ten miles after the contract with said W. W. Walker as agent of Coler & Co. were not disbursed by the treasurer of the Arizona Narrow Gauge Railroad Company, but were all paid out by C. S. Coler as the representative and disbursing agent of W. N. Coler & Co. That the said Arizona Narrow Gauge Railroad Company never paid any interest on the bonds of said railroad company held by Pima county, and that the said Arizona Narrow Gauge Railroad Company never had any money with which to pay such interest and that all the said bonds of said railroad company held by Pima county were at all times and now are worthless. That for one year after 1886 taxes were paid on the property of the Arizona Narrow Gauge Railroad Company by W. N. Coler & Co., but that no taxes were paid after that time, and that W. N. Coler & Co. were notified that the taxes were unpaid and were notified of everything going on in Tucson.

XII.

That the said first-mortgage bonds of the said Arizona Narrow Gauge Railroad Company which were exchanged

for the $150,000 bonds of Pima county were duly made and executed by the said company, were secured by deed of trust or mortgage to at least two trustees of all the property, real and personal, owned by said railroad at the time of the issuance of said bonds, or might thereafter be acquired, including also all franchises and privileges of whatsoever kind or nature, and which said deed of trust or mortgage was the first made of or on said property, and said bonds of said company were issued in the name of said company, and were made payable to bearer twenty years after date, and have interest coupons thereunto attached, and were made payable both principal and interest at the office of said company in the city of Tucson, in the county of Pima, and said deed of trust or mortgage provided that no more bonds than to the amount of $13,000 per mile to be secured by said deed of trust or mortgage should be issued by said railroad company, and the said first-mortgage bonds of said railroad company were likewise in all other respects made, issued and delivered in full conformity to all the provisions of the said act of the legislature of the Territory of Arizona approved February 21, 1883, entitled "An act to promote the construction of a certain railroad."

The court rendered its opinion (rec., p. 80), holding that in the case of Utter *v.* Franklin, *supra*, the records of the supreme court of Arizona show that the demurrer to the petition was sustained and the petition dismissed; that the judgment of the supreme court of Arizona, where this cause originated, disclosed that the judgment of that court, from which the appeal was taken to the Supreme Court of the United States, was rendered upon the issue of law raised by the demurrer and not upon any issue of fact raised by the original return, and that the mandate of the Supreme Court of the United States, reversing the cause and remanding it to the supreme court of Arizona "for proceedings not inconsistent with the opinion," made it the duty of the supreme court of Arizona to consider and decide any issue of fact properly pleaded which amounts to a defense and which is not, in fact, decided by the Supreme Court of the United

States in passing upon the issue of law presented by the demurrer, and that the issue of fact raised by the amended return involved the question as to whether the bonds were exchanged by the county of Pima for the bonds of the Arizona Narrow Gauge Railroad Company in good faith and in compliance with the act of the territorial legislature of February 21, 1883.

The court stated in its opinion (rec., p. 81):

"The defendants now present two objections to the granting of the writ of mandate which arise out of facts that did not exist at the time the case was heard in this court on the demurrer. These are, first, that the action was begun against Benjamin J. Franklin, governor, C. P. Leitch, auditor, and C. M. Bruce, secretary, and that each of the defendants has long since been superseded in office by another person, and that therefore the action should abate. Second, that the loan commission has ceased to exist by repeal of the statute creating the same, and no provision was had in the repealing statute reserving from its operation pending proceedings, and that therefore the action must abate because there is no officer or person upon whom the duty rests to fund the bonds in question, or against whom the writ of mandate may be enforced."

As to these points the court held, first, that "the loan commissioners were by the statute made a continuing body, and the delinquency complained of related to a continuing duty of the commission," and therefore that this action has not abated by the fact that the original defendants had been superseded in office.

As to the second point, the court held that the act of the Territory of Arizona appearing as title XXXI of the Revised Statutes of Arizona of 1887 (which act is set out in full in the appendix to this brief), providing for the creation of a commission to be known as the loan commission and the funding by this commission of the outstanding and existing indebtedness of the Territory, was repealed and

superseded by the act of Congress of June 25, 1890, the first provision of which act is as follows:

"An act approving, with amendments, the funding act of Arizona.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the act of the Revised Statutes of Arizona of eighteen hundred and eighty-seven, known as 'title XXXI—funding,' be, and is hereby, amended so as to read as follows, and that as amended the same is hereby approved and confirmed, subject to future territorial legislation."

This act of Congress, the lower court held, "is now the paramount law upon the subject of funding, and became a part of the organic law of the Territory of Arizona to the extent, at any rate, that it may not be changed so as to render any of its provisions inoperative by any act of the territorial legislature, except with the express consent of Congress."

The court further construed act No. 32 of the Laws of Arizona of 1899, entitled "An act to abolish the loan commission and to repeal sundry laws relating thereto" (set out in full in the appendix hereto), and held that, "irrespective of the question of the power of the territorial legislature to repeal the congressional act creating the loan commission, it is more than doubtful that the act of 1899 (No. 32, above cited) can be construed so as to effect that result."

Further considering the facts, the court held that there had been a compliance with the terms of the act of the legislature under which the bonds were issued, and that they should be funded, and entered judgment to that effect (rec., p. 113).

Respondents filed a motion for a rehearing on the ground that the opinion was opposed to former decisions of the supreme court of Arizona and of this court. This motion

being overruled, respondents were allowed and duly perfected their appeal to this court.

The appeal presents the two questions:

1st. Has the loan commission been abolished?

2d. If not, should these bonds be funded?

SPECIFICATION OF ERRORS.

The court erred in not holding that the loan commission of Arizona had been abolished prior to the judgment herein and in not holding that at the date of such judgment there was no loan commission and no loan commissioners against whom any judgment could be rendered or enforced.

The court erred in holding that the bonds and coupons sought to be funded herein were sold or exchanged in good faith.

The court erred in holding that there was not a failure of consideration as to the bonds and coupons sought to be funded herein and in not holding that the failure to build, complete, and operate the Arizona Narrow Gauge Railroad Company, to which company said bonds and coupons were issued, was a failure of consideration as to the bonds and coupons so issued by Pima County and sought to be funded herein.

The court erred in not sustaining defendants' plea of the statute of limitations to the coupons sought to be funded herein.

The court erred in allowing interest on the coupons funded herein.

The court erred in rendering judgment for plaintiffs for the reason that it appears by the evidence herein that plaintiffs have no right to sue except for the bonds and coupons owned by them personally, and because it further appears that no authority was given by the owners of the bonds, which were not owned by plaintiffs, under which plaintiffs were author-

ized to bring suit on any bonds not owned by them, and because the agreement by which the firm of Coler & Co. and plaintiffs undertake to carry on this litigation, and advance all costs and expenses, and to save the owners of the various bonds harmless from any such costs and expenses in case of a failure to secure a settlement or enforcement of the alleged indebtedness represented by said bonds, is illegal and void and contrary to public policy and not enforceable in the courts.

Because the findings of fact as found by the court herein are insufficient to support the judgment, and the judgment and decision are contrary to law for the reason that it fully appears from said findings of fact that the bonds and coupons sought to be funded herein were not sold or exchanged in good faith in accordance with the act of the legislature of Arizona, approved February 21, 1883, under which act said bonds and coupons were issued.

POINTS AND AUTHORITIES.

I.

The writ of mandamus will not issue where it would prove nugatory or unavailing, and parties who have no duties in the premises or whose terms of office have expired or whose offices have been abolished cannot be made respondents in proceedings by mandamus.

Mackey, *ex parte*, 15 S. C., 322.
State *v.* Gibbs, 13 Fla., 55.
State *v.* Steen, 43 N. J. L., 542.
State *v.* Archibald, 43 Minn., 328.
State *v.* Waterman, 5 Nev., 323.
Lamar *v.* Wilkins, 28 Ark., 34.
Mason *v.* School Dist., 20 Vt., 487.
Barkley *v.* Levee Commissioners, 3 Otto (U. S.), 258.

Commonwealth *v.* Commissioners of Hampden, 6 Pick., 500.

People *ex rel.* Commissioners of Transportation *v.* The Central Pacific R. R. Co., 62 Cal., 506.

II.

It is immaterial that the act sought to be coerced by mandamus was a legal duty at the commencement of the proceedings. If it has been subsequently forbidden by law, the writ will not be awarded.

2 Spelling on Extraordinary Remedies, sec. 1378.

Hall *v.* Steele, 82 Ala., 562.

People *v.* Monroe, Oyer & Terminer, 20 Wend., 108.

III.

The loan commission of Arizona was established by the Territory under the authority of legislative act of March 10, 1887.

Revised Stat. of Arizona, 1887, title XXXI.

Utter *et al. v.* Franklin *et al.*, 172 U. S., 416–419.

This was within the legislative power of the Territory which, under the organic law, "extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States."

Revised Stat. U. S., sec. 1851.

Clinton *v.* Englebrecht, 13 Wall., 434.

Coulter *v.* Stafford, 56 Fed., 564.

IV.

The organic law of Arizona specifically authorizes the legislature to do what it pleases as to funding. Section 3 of the act of Congress of July 30, 1886 (Rev. Stat. of Arizona, 1887, p. 37), provides that "nothing in this act shall be construed

to prohibit the refunding of any existing indebtedness of such Territory or of any political or municipal corporation, county or other subdivision thereof."

By this act of July 30, 1886, Congress intended to confer on the various territorial legislatures plenary power to legislate as they deemed expedient with reference to funding.

Lawrence Co. *v.* Jewell, 100 Fed., 905.

V.

Although Congress has the undoubted power to annul or modify at its pleasure the statutes of a Territory of the United States, yet an intention to supersede the local law is not to be presumed unless clearly expressed.

France *v.* Connor, 161 U. S., 65.

VI.

The act of Congress of July 25, 1890, entitled "An act approving with amendments the funding act of Arizona," did not change the territorial act into a congressional one.

Miners' Bank of Dubuque *v.* Iowa, 53 U. S., 12 How., 107.

Lyon *v.* Woods, 153 U. S., 661.

Irwin *v.* Irwin, 37 Pac., 548.

Martin *v.* Territory, 56 Pac., 712.

Schuerman *v.* Territory, 60 Pac., 895.

VII.

The statutes of Arizona, title XXXI, 1887, creating the loan commission, were retained and re-enacted in the act of Congress of June 25, 1890. The effect, therefore, is not to repeal and re-enact the portion retained, but such portion continues in force from the time of the first enactment. A new statute should be construed as a continuation of the

old one, with the modifications contained in the new one, although it formally repeals the old statute, when it re-enacts its substantial provisions and the two statutes are almost identical.

Bear Lake and R. Waterworks and I. Co. *v.* Garland, 164 U. S., 1.
Moore *v.* Mausert, 49 N. Y., 332.
Ass'n *v.* Benshimel, 130 Mass., 327.
State *v.* Bemis, 64 N. W., 348.
Callahan *v.* Jennings, 27 Pac., 1055.
State *ex rel.* Birdsey *v.* Baldwin *et al.*, 45 Conn., 134.
Sternberg *v.* State, 69 N. W., 849.
Sutherland Stat. Con., sec. 133.
Black on Interpretation of Laws, sec. 359.

Where an amendment is made by declaring that the original statute "shall be amended so as to read as follows," retaining part of the original statute and incorporating therein new provisions, the effect is not to repeal and then re-enact the part retained, but such part remains in force as from the time of the original enactment, while the new provisions become operative at the time the amendatory act goes into effect, and all such portions of the original statute as are omitted from the amendatory act are abrogated thereby, and are thereafter no part of the statute.

Ely *v.* Holton, 15 N. Y., 595.

VIII.

Nothing is better settled than that repeals, and the same may be said of annulments, by implication, are not favored by the courts, and that no statute will be construed as repealing a prior one, unless so clearly repugnant thereto, as to admit of no other reasonable construction.

Cope *v.* Cope, 137 U. S., 682.

To repeal an act by necessary implication it is not sufficient to establish that subsequent laws cover some or even all the cases provided for by it, for they may be merely affirmative or cumulative or auxiliary; but there must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy.

Daviess *et al. v.* Fairbairn *et al.*, 3 How., 636, citing Wood *v.* U. S., 16 Pet., 362.

Repeal by implication is not favored in law. It is held to occur only where different statutes cover the same ground, and there is a clear and irreconcilable conflict between the earlier and the later. The rule as thus stated is so well settled that discussion and the citation of authorities are unnecessary.

Wood Co. *v.* Lackawanna Iron & Coal Co., 3 Otto, 619.

IX.

Statutes relating to the same thing are *in pari materia*, no matter when they were passed, and are to be construed together as though enacted at the same time.

State *v.* Gerhardt, 145 Ind., 439.
Potter Dwar. St., 145.
Vane *v.* Newcombe, 132 U. S., 220.
Black on Interpretation of Laws, p. 204.
Board of Com'rs *v.* Ætna Life Ins. Co., 90 Fed., 222.

A statute amending a former act operates as to matters thereafter occurring precisely as if the amendatory statute had been added to the prior act at the time of the latter's adoption, and the two acts must be considered together and

as one statute. The amendment becomes a part of the original act.

Holbrook *v.* Nichol, 36 Ill., 161.
Peters *v.* Vawter, 25 Pac., 438.
Ludington's Case, 15 Ct. Cl., 453.

X.

The various funding laws of Arizona merely conferred a privilege on holders of bonds to have them funded, and created no contract that this should be done, and the offer could lawfully be withdrawn.

Durkee *v.* Board of Liquidation, 103 U. S., 646.

These laws were only a means by which the Territory could execute its own policy or transact its own business, and might lawfully be altered or repealed at pleasure. Such funding arrangements are not a contract, but a mere legislative regulation.

Board of Com'rs *v.* Ætna Life Ins. Co., 90 Fed., 222, 227.
Durkee *v.* Board of Liquidation, *supra.*
San Francisco *v.* Beideman, 17 Cal., 443.
South Carolina *v.* Gaillard, 11 Otto, 433.
Bank *v.* Knoop, 16 How., 408.
Cooley Constitutional Limitations, 145.
Dillon's Municipal Corporations, sec. 69.

The rule is that in modes of proceeding and of forms to enforce the contract the legislature has the control and may enlarge, alter, or limit them, provided that it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of that right. A person has no vested right in a remedy conferred by statute to prevent the law-making power from modifying such remedy or

adding new conditions to its exercise or withdrawing it entirely.

Tennessee *v.* Sneed, 96 U. S., 69.

Brainard *v.* Hubbard, 12 Wall., 1.

Covington & L. R. Co. *v.* Clinton County Court, 12 B. Mon., 144.

XI.

Act No. 32 of the legislature of Arizona of 1889, entitled "An act to abolish the loan commission and to repeal sundry laws relating thereto," abolished the loan commission without reserving any pending proceedings from the operation of the repealing statute, and the present action must abate, because there are no officers or persons upon whom the duty rests to fund the bonds in question or against whom the writ of mandate may be enforced.

If there were any doubt as to the meaning of this act, it would be removed by the title, which shows that the purpose of the act was "to abolish the loan commission."

Coosaw Mining Co. *v.* State of South Carolina, 144 U. S., 550, citing the cases.

ARGUMENT.

The first of the two points on which appellants chiefly rely is that this action has abated, because the loan commission of Arizona was abolished prior to the judgment herein, and there are now no persons upon whom the duty rests to fund the bonds in question or against whom the writ of mandate may be enforced.

This point involves a consideration of the various territorial and congressional acts relating to funding. These acts have been before the lower court in several cases, Schuerman *et al. v.* Territory, 60 Pac., 895; Gage *v.* McCord, 51 Pac., 977; Bravin *v.* City of Tombstone, 56 Pac., 719, but

none of these decisions were referred to in the opinion in the present case.

As to the first of our two main points we shall endeavor to establish the following propositions:

1. That the loan commission was not created by the congressional act, but originally derived its authority from the territorial act, and that it continued to exist by virtue of that act and not by reason of any legislation of Congress.

2. That act No. 32 of the Laws of Arizona of 1899 specifically abolished the commission.

I AND II.

If the loan commission was abolished prior to the judgment herein it seems clear that this action has abated, and that the case should be reversed and remanded, with directions to dismiss the petition.

III.

The loan commission was established under the authority of the legislature of Arizona on March 10, 1887 (Revised Stat. of Arizona, 1887, title XXXI, p. 361, as set out in full in the appendix to this brief), the first paragraph creating the commission being as follows:

2039. (SEC. 1.) For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the Territory of Arizona, the governor of the said Territory, together with the territorial auditor and territorial secretary and their successors in office, shall constitute a board of commissioners to be styled the loan commissioners of the Territory of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided.

As to this it would seem that there can be no possible doubt. This court stated when this case was before it in Utter *v.* Franklin, *supra*, that the act of the legislature of Arizona, above cited, is the "authority under which the loan commissioners were appointed." Their appointment is by virtue of paragraph 2039, above quoted. All the other paragraphs of the act simply set out their powers and duties.

The lower court in its opinion speaks of the "congressional act creating the loan commission." This suggestion, however, is entirely unfounded. The Territory, not Congress, created the commission. The lower court so decided in former cases, its language in Schuerman *v.* Territory, *supra*, being as follows: "The act (title XXXI, Rev. Stat. of Arizona, 1887), being a territorial act and the commission being the creation of the Territory," etc.

It is clear that if no superior power has intervened the same authority, viz., the Arizona legislature, which created the commission, could abolish it. The act of 1887 fixed no term for the commission, and as there was no constitutional prohibition against discontinuing the board, it could be entirely abolished by the legislature. The repeal of paragraph 2039 would have ended its existence. The legislature created the office, and it had full power to abolish or change it. Undoubtedly, as a general proposition, a State or Territory may abolish any public office created by a public law of its own. One legislature is competent to repeal any act which a former legislature was competent to pass (Fletcher *v.* Peck, 6 Cranch, 87; Newton *v.* Commissioners, 100 U. S., 559).

This creation of the loan commission by the Territory of Arizona was within the legislative power, which "extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." To use the reasoning and language of this court in Clinton *v.* Englebrecht, 13 Wall., 434, "As there is no provision relating to" funding "in the constitution or the organic act, it cannot be said that

any legislation upon this subject is inconsistent with either." The matter of funding was, therefore, a rightful subject of legislation, and the territorial statute was a valid act regulating the financial policy of the Territory.

Lawrence Co. *v.* Jewell, 100 Fed., 905.

Argument, however, is not needed as to this point, because the organic law specifically authorizes the legislature to do what it pleases as to funding. Section 3 of the act of Congress of July 30, 1886 (Revised Stat. of Arizona, 1887, p. 37), provides that "nothing in this act shall be construed to prohibit the refunding of any existing indebtedness of such Territory or of any political or municipal corporation, county or other subdivision thereof."

This act was fully and carefully considered and construed by the circuit court of appeals, eighth circuit, in Lawrence County *v.* Jewell, *supra*, in which the court said, referring to the concluding clause, above quoted, of section 3:

"On the other hand, counsel for the bondholders contend broadly that Congress intended by the language above quoted to leave the Territories and each of the political subdivisions thereof at full liberty to refund any of their indebtedness which existed on July 30, 1886, as they thought best; and to leave the territorial legislatures at liberty to legislate as they deem proper relative to the refunding of any existing debts, provided the power to refund was exercised in good faith. We are of opinion that the latter view of the act is supported by the better reasons, and that it should prevail. It is noticeable that the power to refund existing debts was conferred upon the various political subdivisions of the Territories in the most general terms, and that the clause conferring that power serves to qualify every other provision contained in the act. * * * Congress intended to confer on the various territorial legislatures plenary power to legislate as they deemed expedient with reference to the settlement of such obligations. It was the intent of Congress to leave the past fiscal acts of municipal corporations in the Territories, and the power of the territorial legislature to deal with the same, wholly unaffected by the

act." * * * "It must be presumed that when Congress declared, as in the act of July 30, 1886, that it should not be construed 'to prohibit the refunding of any existing indebtedness,' that had been contracted by the various political subdivisions of the Territory, it intended to leave them at full liberty to refund their debts in any of the customary ways in which such an operation might be accomplished, and to place no restrictions upon acts done in that behalf, save the restriction that the operation should be undertaken and pursued in good faith, for the sole purpose of retiring an existing debt. Any other view of the act under consideration would render the power to refund, which Congress clearly intended to confer, of little practical value. * * * The act of Congress * * * in express terms left the counties at liberty to refund the old debts in any way that that end could be accomplished with the sanction and approval of the territorial legislature. * * * The territorial legislature possessed that authority (the power to pass refunding laws) prior to the act of July 30, 1886, and it does not seem to have been the purpose of Congress to withdraw the authority, or to place restrictions upon the exercise of any legislative power which it might be found expedient to exercise for the purpose of enabling any county or municipality of the Territory to adjust, compound and liquidate its antecedent liabilities. The power to legislate to that end remained as it was before the act of July 30, 1886, was passed."

We submit that it is apparent that Congress intended to give and did give to the various territorial legislatures plenary—that is, full, entire, complete, absolute—power as to funding, and did not place restrictions upon the exercise of any legislative power by the Territories as to this subject. This plenary power of funding would include the power in the territorial legislature to create such a funding commission as it thought best, would include the power to add to or modify the duties of the commission, and, of course, the power to abolish the commission which it had created.

This being the fixed and long-established policy of Congress, amendatory acts are to be construed with reference to the existing system of laws on the subject to which they

pertain, and, if possible, to be construed as parts of that system and in harmony with that long-established policy. (U. S. *v.* Jessup, 15 Fed., 790; Yuengling *v.* Schile, 12 Fed., 97; Wilmot *v.* Mudge, 103 U. S., 217–220.)

Such a construction as will leave the territorial legislatures with plenary power as to funding will be in harmony with that system, while any construction which takes this power from the legislatures, or imposes any restrictions on its exercise, will be out of harmony.

An examination of the acts themselves will show, as it is confidently submitted, that they are all in harmony with this established policy. These acts we will consider seriatim.

The first one after the Arizona statute of 1887 is the act of Congress of June 25, 1890 (26 Stat. at L., 175). This act provides "that the act of the Revised Statutes of Arizona of 1887, known as 'Title XXXI—Funding,' be, and is hereby, amended so as to read as follows, and that as amended the same is hereby approved and confirmed, subject to future territorial legislation."

Title XXXI is set out in full in the appendix to this brief, and when it is compared with the congressional act of 1890 it will be seen that the amendments are unimportant and chiefly verbal. A careful comparison of the two acts shows that the only changes, excluding wholly immaterial ones, are that the rate of interest is changed from not to exceed six and a half per cent. to five per cent. (par. 2041); that the order of the territorial auditor shall be "countersigned by the governor" (par. 2044); that "before any such indebtedness shall be paid the territorial auditor shall endorse on each certificate the amount due thereon," etc.; "ten years after such bonds shall have been issued" is changed to "fifty years" (par. 2047), and to this section is added the proviso, "Nothing herein shall be construed to prevent the legislature of Arizona from creating a sinking fund during the life of said bonds for their redemption at maturity;" to paragraph 2048 is added the provision whereby county,

municipal, and school indebtedness may be refunded upon demand of the proper authorities, and after the last paragraph of title XXXI is added the clause providing that "present and outstanding indebtedness, together with such warrants as may be issued for the necessary and current expenses of carrying on territorial, county, municipal, and school government for the year ending December 31, 1890, may also be funded and bonds issued for the redemption thereof."

These are all the changes except the verbal ones by which the commission was given the power to fund not only outstanding and existing indebtedness, but also such future indebtedness as may be or is now authorized by law.

The act of 1890 is thus identical with title XXXI of the Revised Statutes of Arizona, except for these verbal changes, and except for the provisions for funding county and other indebtedness and accruing indebtedness up to December 31, 1890. The territorial legislature, by virtue both of its general powers as to all rightful subjects of legislation and also by the act of July 30, 1886, had, prior to the act of 1890, full power to fund all county, municipal, and school indebtedness, and could have included such indebtedness in the original title XXXI if it had been so inclined, and the concluding proviso of the congressional act was simply a permission to the Territory to fund indebtedness which had accrued in excess of the limitations of the Harrison act. There would appear to be absolutely nothing in this act of June 25, 1890, which takes from the Territory its plenary power as to funding, and nothing from which any valid argument can be made that Congress intended to depart from its policy of leaving the whole subject of funding entirely within the will of the legislatures.

The amendment and approval by Congress of this Arizona statute creating the loan commission did not make it a congressional act or take from Arizona the power to repeal title XXXI as amended by the act of 1890. We submit

that this rule has been expressly declared by this court in Miners' Bank of Dubuque *v.* Iowa, 53 U. S., 12 How., 107, the facts and reasoning in which appear to constitute a controlling precedent. In that case the territorial legislature of Wisconsin chartered the Miners' bank. Afterwards an act of Congress annulled the charter in certain particulars, but left other of its provisions in force. Thereafter the Territory was divided by act of Congress, and the Territory of Iowa was erected over that part of the former Territory of Wisconsin in which the bank was situated. Later, the territorial legislature of Iowa repealed the charter, and directed the settlement of the affairs of the corporation by trustees under the supervision of the court. A *quo warranto* proceeding was instituted against the bank. In deciding the case on appeal, this court used this language:

"It has been argued in this case that as Congress, in creating the territorial governments of Wisconsin and Iowa, reserved to themselves the power of disapproving and thereby annulling the acts of those governments, and had, in the exercise of that power, stricken out several of the provisions of the charter of the Bank of Dubuque, enacted by the legislature of Wisconsin, assenting to the residue, that therefore the charter of this bank should be regarded as an act of Congress rather than of the territorial government. * * * The fallacy of this argument is easily detected. Congress, in creating the territorial governments and in conferring upon them powers of general legislation, did not, from obvious principles of policy and necessity, ordain a suspension of all acts proceeding from those powers, until expressly sanctioned by themselves, whilst for considerations equally strong they reserved the power of disapproving or annulling such acts of territorial legislation as might be deemed detrimental. A different system of procedure would have been fatal to all practical improvements in those Territories, however urgently called for; nay, might have disarmed them of the very power of self-preservation. An invasion, or insurrection, or any other crisis demanding the most strenuous action, would have had to remain without preventive or remedy, till Congress, if not

in session, could be convened, or when in session, must have awaited its possibly procrastinated aid.

"The argument would render also the acts of the territorial governments, even the most wholesome and necessary and though indispensably carried to the extreme of authority, obnoxious to the charge of usurpation or criminality. The reverse of this argument, whilst it is accordant with the investiture of general legislative power in the territorial governments, places them in the position of usefulness and advantage towards those they were bound to foster, and subjects them at the same time to proper restraint from their superiors. The charter of the Bank of Dubuque enacted in all its details and powers ever possessed by it (and according to which it was in fact organized), by the legislature of Wisconsin, must be looked upon as the creature of that legislature. To regard it, as we are urged to do by the arguments of the plaintiff in error, would constitute it rather a bank of the United States, situated without the United States, and operating within the Territory of Wisconsin, now the State of Iowa, independently of the power or local policy of that State, and beyond the reach of its faculties or obligations to be exerted for its own citizens. * * * We regard both the charter granted by Wisconsin, and the repeal of that charter by Iowa, alike as acts of the territorial authorities."

In the case of U. S. *v.* Church, 15 Pac., *supra*, affirmed by this court on appeal, 136 U. S., 1, it appears that an act of the Territory of Utah had been disapproved and partly annulled by subsequent action of Congress, and it was contended that inasmuch as Congress had thus acted changing the territorial statute, therefore the remainder of the charter was made an act of Congress. But the court held otherwise, saying that no such intention was expressed, and that so much of the charter as remained in force did not become in effect a law of the United States.

Miners' Bank of Dubuque *v.* Iowa was followed and approved in Lyons *v.* Woods, 153 U. S., 661, in which the court quoted the foregoing language in full and also restated the familiar rule that it must be presumed that all laws passed

by a Territory were duly submitted to Congress and not being disapproved were thereby sanctioned.

In the case of Irwin *v.* Irwin, 37 Pac., 548, the supreme court of Oklahoma held that the act of Congress ratifying the law of the territorial legislature granting to probate courts jurisdiction in actions for divorce was in the nature of permissive legislation, and did not take from the legislature the power to repeal such act, and in arriving at its conclusion the court used the following language, which seems to be fully applicable to the present consideration:

"It will be seen that this act emanated first from the legislature; that it was a thought or purpose which had no place in the mind of Congress until presented to that body by the people of this Territory through its chosen body, the legislature. The law never would have had an existence as an independent creation by Congress. We regard the action of Congress as being in the nature of a license to the legislature of this Territory, as of not having been intended as a command, but as a permission, and that the law should have no greater effect than a law of our legislature; that Congress did not, by ratifying the legislative enactment, place it without the power of such legislature to repeal the same; and, this being true, it follows that, where the act was repealed, such repeal carried with it the jurisdiction of the probate courts."

In Martin *v.* Territory, 56 Pac., 712, the supreme court of Oklahoma say:

"The sound rule would seem to us to be that, when a legislative enactment requires the ratification by Congress before it can become effective as a law, and it is ratified, then the legislature has no power to effect its repeal, but if a statute is within the legislative power, its subsequent ratification not being required to give it validity, such ratification would not prevent the legislature from changing such statute, and this seems to be the effect of the reasoning and authorities cited in Irwin *v.* Irwin, 41 Pac., 369."

This case of Miners' Bank *v.* Iowa seems to us an exact authority. What it holds is that where a territorial act within the power of the Territory to pass in the first instance has been revised by Congress, so much of the act as is not disapproved remains a territorial act, and may be repealed by the Territory. Under this reasoning all of the statute of 1887 which was not modified by the congressional act remained an act of the Territory and could be repealed by it, and this includes the paragraph creating the commission. The fact that the act of 1890 suggests some additions which the Arizona legislature might adopt if it chose, so much the more strongly shows that the act was a territorial act, because Congress did not attempt to make any unconditional change in it. These additions came into force not by virtue of the congressional act, but because of the pleasure of the legislature in adopting them with such modifications as it saw fit to make.

We think that the present case, where the territorial act was approved with amendments, is even stronger than where, in the Miners' Bank case, part of the act was so obnoxious as to be disapproved. The act of 1890 made suggestions as to a change in the rate of interest and the time the bonds are to run, but we suppose that no one would seriously argue that this changed the act from a territorial to a congressional one. It was suggested, moreover, as has been heretofore stated, that municipal and other obligations might also be funded, but all this was fully in the power of the legislature by the organic law. Congress waived the provisions of the Harrison act as to certain indebtedness issued in excess of the limit, and gave the Territory the right to fund such indebtedness if it saw fit; but where, under the authority of the Miners' Bank case, is there anything changing the territorial act into a congressional one? The supreme court said in that case: "The charter of the Bank of Dubuque enacted in all its details and powers ever possessed by it (and according to which it was in fact

organized), by the legislature of Wisconsin, must be looked upon as the creature of that legislature." The loan commission was the creature of the legislature of Arizona by the act of 1887 and remained under legislative control.

This construction of the act of 1890 is, we submit, in accord with the well-established relation between the Territories and Congress.

In Clinton *vs.* Englebrecht, 13 Wall., 418, *supra*, this court said:

"The theory upon which the various governments for portions of the territory of the United States have been organized has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority, and with certain fundamental principles established by Congress."

The creation of the loan commission was, as we have endeavored to show, a matter of self-government within the rightful exercise of the legislative authority. What reason is there to hold that Congress intended to take from the Territory the subsequent control of the commission? Such a commission is a matter of policy, useful, perhaps, in one Territory and not in another, and useful, if at all, only for a limited time. In the very nature of the case it is likely to be temporary. It was created because the legislature of Arizona thought it wise to do so, and the same legislature has thought it wise to discontinue it.

This court says in the Miners' Bank case that unless the Territory has the power to repeal the body which it has created, "some crisis demanding the most strenuous action would have to remain, without preventive or remedy, till Congress, if not in session, could be convened, or, when in session, must have awaited its possibly procrastinated aid."

If the Arizona legislature was of the opinion that the best interests of the Territory demanded the abolishment of the loan commission could it not discontinue it? The Territory

did pass act No. 78 of the Nineteenth Legislative Assembly, Laws of 1897, p. 140 (set out in appendix), "limiting the expense of the loan commission of the Territory of Arizona." Such action shows that the legislature regarded the commission as under its control. If the legislature thought best to save all the expense of the commission by discontinuing it, could it not have done this as well?

"An intention on the part of Congress to supersede the local territorial law is not to be presumed unless clearly expressed" (France *v.* Connor, 161 U. S., 65, *supra*).

To hold, by implication, that Congress has prohibited the legislature of Arizona from abolishing the tribunal which it created, would seem to say, in the language of the supreme court of Wyoming in France *v.* Connor *et al.*, 27 Pac., 569-575, that "Congress had set aside, without reason, and by inference and implication, the great right of home rule, of dealing with 'rightful subjects of legislation,' vested in territorial legislatures and only withdrawn in extreme cases." Such reasoning seems to be that the legislature under our organic law had a right to establish the loan commission and then, under what is assumed to be further organic law, had no right to discontinue it.

That the funding act remained a territorial act, even after the passage of the congressional act of June 25, 1890, was announced by the lower court in Schuerman *v.* Territory, 60 Pac., 895, *supra*. In arriving at its judgment in that case the court said:

"There is no provision in the funding act of 1887, as amended by Congress in 1890, that the commissioners should jointly act, but the board was treated as a unit. The funding act is not strictly a congressional act. It is a territorial act, passed by the legislature of the Territory, and embodied in the Revised Statutes of 1887. For the purpose of assuring the validity of the act, and of placing any issuance of bonds under it beyond dispute, the act was presented to Congress for its affirmative approval, which

it gave with some few amendments, generally verbal in their nature, and evidently for the purpose of making the act more specific. The title of the act passed by Congress clearly carries out that view, for the first provision of that act is that the act of the Revised Statutes of Arizona of 1887, known as title XXXI, funding, be and is hereby amended so as to read as follows: 'And that as amended the same is hereby approved and confirmed, subject to future territorial legislation.' The act being a territorial act, and the commission being the creation of the Territory, it is directly affected by paragraph 2932, *supra* (of the Revised Statutes of Arizona)."

The foregoing decision was rendered March 28, 1900, and upholds the action of the loan commission on September 17, 1897. If the funding act was on the last date "a territorial act," and the commission was then "the creation of the Territory" and subject to the statutes of the Territory, it was just as fully a territorial act and the commission was just as fully the creation of the Territory and just as fully subject to its statutes on March 13, 1899, when the legislature passed act No. 32, entitled "An act to abolish the loan commission and to repeal sundry laws relating thereto," and specifically repealed paragraph 2039, section 1, chapter 1, title XXXI, of the Revised Statutes of the Territory of Arizona.

It seems to be a contradiction in terms to hold that the congressional act which provides that "the funding act of Arizona, as amended, is hereby approved and confirmed" means that "the funding act of Arizona, as amended, is hereby abrogated and annulled, and by implication, repealed."

The case of U. S. *v.* Tynin, 11 Wall., 88, is cited in support of the rule that when "two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the former and embraces new provisions plainly showing that it is intended as a substitute for the first act, it will operate as a repeal of that act." But we submit that this rule has no application to the facts of the present case. The act of

June 25, 1890, is plainly not a substitute for but an amendment of the funding act of Arizona. It leaves the Arizona act in full force as amended. The difference between two separate acts, the latter of which by implication may repeal the first, and two acts, the second of which is merely amendatory of the first, is obvious. "To approve" is "to sanction officially, to ratify, to establish." "To confirm" is "to make firm or firmer, to render valid by formal assent." Title XXXI, which was approved and confirmed, must, as we have suggested, have remained in force as amended, and remained in force as a territorial act just as though it had originally been passed as amended.

The Arizona statute was re-enacted by the act of Congress *verbatim et literatim*, with the few changes above noted, and it was re-enacted in quotation-marks, as if to show that it was not new legislation. Under the authorities, as fully set out under our point VII, when the Arizona statute was amended "so as to read as follows," and the paragraph creating the commission was re-enacted in terms, such part remained in force as from the time of the passage of the Arizona statute. The congressional act is merely a continuation of the Arizona one. This court so expounded the law in Bear Lake and R. Water Works and I. Co. *v.* Garland, 164 U. S., *supra*, as follows:

"Upon comparing the two acts of 1888 and 1890 together' it is seen that they both legislate upon the same subject, and in many cases the provisions of the two statutes are similar and almost identical. Although there is a formal repeal of the old by the new statute, still there has never been a moment of time since the passage of the act of 1888 when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modification contained in the new act. This is the same principle that is recognized and asserted in Pacific Mail S. S. Co. *v.* Joliffe, 69 U. S., 450. In that case there was a repeal in terms of the former statute, and yet it was held that it was not the intention of the legis-

lature to thereby impair the right to fees which had arisen under the act which was repealed. As the provisions of the new act took effect simultaneously with the repeal of the old one, the court held that the new one might more properly be said to be substituted in place of the old one, and to continue in force, with modifications, the provisions of the old act, instead of abrogating and annulling them and re-enacting the same as a new and original act."

Bearing in mind the fact that paragraph 2039 of the territorial statute is copied into the congressional act without change (except as it is made to cover such future indebtedness as might be allowed by law), we submit, as above, that this paragraph cannot be considered as repealed and re-enacted, but must be taken to have been the law all along. The congressional act is a mere continuation of the territorial act as to those sections of the territorial act which were copied without change, and is not in a proper sense a repeal.

If the act of Congress of June 25, 1890, is considered as a substitute for the territorial act, as announced in the opinion of the court herein, it repeals the territorial act only *pro tanto*, so far as there may be a repugnancy. It does not repeal paragraph 2039, because that paragraph is copied into the congressional act and is continued in force, and the loan commission, which derived its authority from the territorial act, continued, after the congressional act, to exist by virtue of the same territorial act, and was not a creation of the congressional act.

On this point, which goes to the very heart of the question, our position is that the court erred in holding that the territorial act was repealed by the congressional as to any provisions which were copied into the congressional act. The law is that repeals by implication are not favored, and the theory of repeals by implication applies only in cases where the provisions of the earlier and later statutes are inconsistent. Where any provision of the old law is carried

into the new one, such provision is not repealed and re-enacted, but is considered to have been in force from the beginning, and to remain in force under the law which originally enacted it.

Our view that there is nothing in the act of Congress indicating any change in the policy under which the whole subject of funding was left without restriction in the power of the territorial legislature is, we think, proved by the fact that the act of Congress in express terms provides that title XXXI of the Arizona statute is hereby approved and confirmed, "subject to future territorial legislation." The matter of funding was left where it was before, viz., wholly subject to territorial legislation. It is hard to see what words could have been employed which would more fully convey the idea that even after the act had been approved by Congress the Arizona legislature might legislate as it saw fit regarding it. This court said in Newhall *v.* Sanger, 92 U. S., 761, that "there is no authority to import a word into a statute to change its meaning." "Subject to future territorial legislation" cannot, according to any just rule of construction, be restricted to mean "subject to a particular kind of territorial legislation," or "subject to one act of future territorial legislation." The phrase is unrestricted, and must be taken to mean "subject to any future territorial legislation." Before the approval by Congress of title XXXI the legislature had the undoubted power to abolish the commission which it had created, and, as the title was left "subject to future territorial legislation," it had the power to do so after the congressional act as fully as before.

We think that our construction of the phrase, "subject to future territorial legislation," is fully supported by the decision of this court in Head *v.* Curators of the University of the State of Missouri, 19 Wall., 526, where the court said:

"The plaintiff was elected a professor of mathematics in the University of Missouri, and it was resolved that he should hold his office for six years from July 5, 1856, 'sub-

ject to law.' The judge at the circuit held, and we think correctly, that this expression meant subject to whatever law this State legislature might think fit to pass."

We understand this to be so held by this court in Utter *v.* Franklin, where, construing the words "subject to future territorial legislation," the opinion states that:

"In compliance with the permit thus given by Congress for future territorial legislation, the legislature of Arizona on March 18, 1891 (Laws of 1891, p. 120), enacted a new funding law."

The title of this new funding law states that it is "supplemental to the act of Congress" of June 25, 1890, which is re-enacted "subject to the modifications and additional provisions hereinafter set out." One most important modification was that "all bonds issued under the provisions of this act shall be payable in gold coin of the United States," and an additional change was made by adding the section 7, by which municipal indebtedness might be refunded without the demand of the authorities provided for by the tenth section of the congressional act.

As a matter of fact all the funding bonds have been issued under this new funding law and not under title XXXI as approved by Congress. The bonds are all payable in gold coin of the United States, as provided in this new funding law. Title XXXI provided that the interest should be payable in gold coin or its equivalent in lawful money, but stipulated that the principal shall be payable "in lawful money," and this language was unchanged when the title was approved and confirmed by Congress; but it was changed by the new funding law so that "all bonds issued under the provisions of this act and the interest thereon shall be payable in gold coin of the United States." What Congress refused to do the Arizona legislature did, and the change was a most important one in view of the history of the times regarding the financial question.

These changes and additional provisions were sanctioned by Congress because they were never disapproved, and the only theory under which such legislation is intelligible is that both Congress and the Arizona legislature regarded the matter of funding as wholly "subject to future territorial legislation."

The questions seem pertinent and material: If the Arizona legislature could modify the act in this important particular and add additional provisions, had it not as much power to add other provisions? For instance, could it not have provided that the loan commission should expire within a year? And, if it had power to limit its existence, could it not have abolished it entirely? Evidently it could have done so, unless it should be held that it did not have power to do directly what it could do indirectly; and if it had power in 1891 to modify or repeal the old funding act, title XXXI, did it not have as much power on March 13, 1899, when it passed the act to abolish the loan commission?

Congress afterwards passed the two amendatory acts of August 3, 1894, and June 6, 1896. The purpose and effect of each of these acts is unmistakable. The first one merely amended section 15 of the act of June 25, 1890, by permitting the funding of indebtedness subsequent to December 31, 1901, and for the years ending December 31, 1894, and December 31, 1895. Section 15 was no part of the original Arizona statute, title XXXI, but is the added proviso in which Congress waived the limitations of the Harrison act and permitted the funding of indebtedness incurred in excess of that act.

The act of June 6, 1896, was of the same permissive nature. It enacts "that the provisions of the acts of Congress approved June 25, 1890, and August 3, 1894, authorizing the funding of certain indebtedness of the Territory of Arizona, are hereby amended and extended so as to authorize the finding" of certain other indebtedness. The act provides

that certain evidences of indebtedness "are hereby confirmed, approved and ratified, and may be funded as in this act provided until January 1, 1897: *Provided*, That nothing in this act shall be so construed as to make the Government of the United States liable for the payment of any of said * * * evidences of indebtedness by this act approved, confirmed and made valid, and authorized to be funded."

Considering this act of June 25, 1896, in the light of the memorial of the Arizona legislature, as this court, in Utter *v.* Franklin, said may properly be done in arriving at "the intention of Congress and the exigencies the act was designed to meet," it seems not to be debatable that the only intention was to cure formal defects as to certain indebtedness.

We submit that if the funding of conceded indebtedness was always within the sole power and discretion of the Arizona legislature, the funding of validated indebtedness would also be within its sole power and authority. The acts further enlarged the class of obligations which might be funded, and did nothing more. Indebtedness which was thus validated was placed on the same footing with indebtedness which had never been questioned, and might be funded if the Arizona legislature saw fit to do so. The legislature was under no obligation to fund any indebtedness whatever. It was under no obligation to create any commission in the first instance and under no obligation to continue the one which it did create. If the indebtedness which was validated had never been questioned, there was no way by which the Territory could have been compelled to fund it. The legislature might have thought best not to fund any indebtedness whatever, and might never have created the commission, and, as we have repeatedly urged, if it came to the conclusion that the purposes of the commission had been accomplished, and it was best to discontinue it, such action

was within its sole power and could not be called in question by any one.

The foregoing construction of these acts of Congress has been announced both by the lower court and this court. In Gage *v.* McCord, 51 Pacific, 977, the supreme court of Arizona considered the effect of these statutes, and gave so full and clear an exposition of them that we reproduce it as follows:

"The acts of June 25, 1890, and August 3, 1894, being referred to, we must therefore consider the act of June 6, 1896, *in pari materia* with the former. The former act confirmed and approved, with amendments, chapter 1, tit. 31, Rev. St., passed by the territorial legislature March 10, 1887. These amendments had reference to the rate of interest, the time bonds issued for funding purposes should run, and as to what indebtedness might be funded; the act being amended in this particular to include county, municipal, and school indebtedness. Congress added to the legislative enactment a provision that in effect validated a class of obligations otherwise invalid, because incurred in violation of the organic law of the Territory, as found in the 'Harrison act,' and providing for the funding of all the then existing and outstanding indebtedness, and that which might thereafter be evidenced by warrants issued for the necessary and current expenses of carrying on territorial, county, municipal, and school government for the year ending December 31, 1890, and added to the foregoing the declaration that thereafter no warrants, certificates, or other evidences of indebtedness should be allowed to issue or be legal when the same is in excess of the limit prescribed by the Harrison act. The act of August 3, 1894, provided 'that an act entitled "An act approving, with amendments, the funding act of Arizona," approved June 25, 1890, and paragraph 2252 (section 15) of said act, be and the same is hereby amended by adding thereto as follows: "Provided, further, however, that the present outstanding warrants, certificates and other evidences of indebtedness issued subsequent to December 31, 1890, for the necessary and current expenses of carrying on the territorial government only, together with such warrants as may be issued for such purpose for the years ending December 31, 1894, and December 31, 1895,

may also be funded and bonds issued for the redemption thereof; and thereafter no warrants, certificates or other evidences of indebtedness shall be allowed to issue or to be legal where the same is in excess of the limit prescribed by the Harrison act."' It is to be noted that, in both the acts referred to, the only limitation imposed had reference to the class of obligations which were permitted to be funded and did not in any manner restrict the territorial officers in the method of their procedure previously prescribed by the territorial law, or limit the time within which the acts of funding, by the sale and disposition of bonds, might lawfully be done. Bearing in mind the remedial character of this legislation, and reading the act of June 6, 1896, in the light of the previous congressional enactments upon the same subject-matter, we construe the former act to express only what obviously appears to be the congressional intent, viz.: to extend and enlarge the class of obligations which may be funded, and not to limit the time within which the board of loan commissioners might complete the acts of funding indebtedness, which has expressly been recognized by congress as fundable."

As they were territorial officers, can it be that the Territory could not discontinue them? As the procedure was prescribed by the territorial laws, can it be that the same laws could not abolish the procedure?

In Utter *v.* Franklin, *supra*, this court, after quoting the act of June 26, 1890, said:

"Its evident purpose was to authorize the funding of all outstanding bonds of the Territory, and its municipalities, which had been authorized by legislative enactments, whether lawful or not, provided such bonds had been 'sold or exchanged in good faith and in compliance with the terms of the act of the legislature by which they were authorized.' The second section deals with the original bonds which had not been theretofore funded, and provides that all such as had been theretofore issued under the authority of the legislature, and which by the first section were authorized to be funded, should be confirmed, approved and validated, and might be funded until January 1, 1897."

After the passage of the act of August 3, 1894, the Arizona legislature passed act No. 33, page 45 of the Laws of 1895 (set out in the appendix). This act re-enacted the congressional act of 1894 and authorized the loan commissioners to fund the indebtedness which Congress had permitted by its act. It seems explainable only on the theory that the congressional act was a permission and not a command; that it was "subject to future territorial legislation," and that the assent of the Territory was necessary before the additional indebtedness could be funded.

It may be suggested that there is a difference in one respect between the act of August 3, 1894, and the one of June 25, 1896. As to the former, it would seem that action by the Arizona legislature was necessary before the funding of the indebtedness became the duty of the loan commission. As to the second act, it may be thought that the duty was imposed upon the commissioners directly by the act itself, without any further sanction by the legislature. The legislature having presented the memorial asking for the validation of certain evidences of indebtedness, its assent might be presumed to such validation, and it might be superfluous to re-enact that the commissioners should have power to do what the legislature had requested. This difference, however, if there is such a difference, in nowise changes the general policy of Congress leaving the subject of funding within the power of the legislature, or impairs the power of the legislature to repeal the commission. If by virtue of the act of June 25, 1896, it became the duty of the commissioners to fund certain bonds, the duty as to these bonds was no higher or greater than the duties as to the indebtedness which existed at the time of the creation of the commission by paragraph 2039, title XXXI, of the Revised Statutes of Arizona of 1887, which provides that the commissioners "shall have and exercise the powers and perform the duties hereinafter provided." The fact that additional duties are

imposed upon an officer does not prevent the office from being abolished. Validated indebtedness was merely put on the same footing as other indebtedness. As long as the commission existed the commissioners had certain duties, but when the commission was abolished all the duties ceased to exist.

It was suggested on behalf of petitioners in the lower court that the repeal by the Arizona legislature of the paragraph creating the loan commission, and of its other acts, could have no effect on the proceedings in this cause, because, *first*, the holders of the bonds are entitled to have them funded under the act of Congress of June 6, 1896, irrespective of any territorial legislation and by its own force and effect; and, *second*, because the holders of the bonds have a right to have them funded under the act of the Territory of March 19, 1891, and it was further urged that the repealing act of 1899 is of no effect as to these bonds, because section 2934 of the Revised Statutes of Arizona of 1887 provides as follows:

"2934. (SEC. 7.) The repeal or abrogation of any statute, law or rule, does not revive any former statute, law or rule thereto repealed or abrogated, nor does it affect any right then existing or accrued at the time of such repeal, or any action or proceeding theretofore taken, except such as may be provided in such subsequent repealing statutes, nor shall it affect any private statute not expressly repealed thereby."

The cases cited under our point X furnish, as we conceive, a complete answer to the first and second of these objections, and the Arizona statute itself answers the third. The bondholders have no "right" to have their bonds funded, under either the act of the legislature or of Congress. The offer to creditors to issue new bonds for outstanding ones is merely a privilege, which may be withdrawn at any time. This court so ruled in Durkee *v.* Board of Liquidation, 103 U. S., 646, *supra*. The syllabus is as follows:

"An offer on the part of the State to issue new bonds for all its valid bonds outstanding, whenever the holders chose to accept the terms on which the exchange was to be made, created no contract with the holders of the bonds that this should be done, even if they were valid, and the offer may be withdrawn."

The language of Mr. Justice Miller, in delivering the opinion of the court, is so clear, and the decision is so analogous to the present case, that we quote as follows:

"The board of liquidation is a mere agent of the government to enable it to carry into effect a plan of consolidating all its outstanding debts and converting it, with the consent of its creditors, into a uniform bond, with the same rate of interest, and providing additional security for its payment. The law under which this liquidating process was to take place and which created this Board of Liquidation, the present defendant, was passed in 1874, some time after all these bonds were issued. It did not, therefore, enter into the contract on which the bonds were issued. It was an offer on the part of the State to issue new bonds for all her valid bonds outstanding, whenever the holders chose to accept the terms on which the exchange was to be made.

"In 1876 the legislature of the State passed an act declaring the bonds now in question void and forbidding the board to receive them as valid in the scheme of liquidation. The legislature undoubtedly had the right to forbid its own agent to receive these bonds. This law may not have affected the validity of the bonds. It certainly could not make them void if they were valid before. But it could prevent the board from exchanging them for other bonds. There was no contract with the holders of these bonds that this should be done, even if they were valid. To make such a contract, there is needed the acceptance of the proposition of the State by the holder and a good consideration. Neither of these existed in this case, when the legislature simply withdrew its proposition as to these bonds."

It seems to us that the principles of law as above announced apply with full force to the present contention. The loan commission is the mere agent of the Arizona legis-

lature to carry out the will of the legislature as to financial matters. These bonds in question were issued in 1883, long before any funding act of any sort was passed. The funding act did not therefore enter into the contract on which these bonds were issued. Using the language of the opinion just cited, "the legislature undoubtedly had the right to forbid its own agent to receive these bonds," because there was no contract with the holders of the bonds that they should be funded. There is no consideration of any sort passing from the bondholders for which they can claim that a contract existed, and the legislature has abolished the loan commission, just as the Louisiana legislature withdrew its proposition.

"A provision of a State to meet its debts or engagements may be regarded as only a means of executing its own policy or transacting its own business, and may be altered or repealed at pleasure. In other words, such an arrangement is not a contract but a mere legislative regulation."

San Francisco *v.* Beidemann, 17 Cal., 443.

"The legislature possesses the entire control and management of the financial affairs of a State or a municipal corporation."

Sangamon Co. *v.* City of Springfield, 63 Ill., 66.
People *v.* Power, 25 Ill., 191.
McCauley *v.* Brooks, 16 Cal., 334.

In Tennessee *v.* Sneed, 96 U. S., 69, this court held that:

"A statute taking away the right to compel a tax collector, by mandamus, to receive notes does not impair the contract with the holder where an effectual remedy was left to him in an ordinary proceeding at law."

The court said further that:

"The rule seems to be that in modes of proceeding and of forms to enforce the contract the legislature has the control, and may enlarge, alter or limit them, provided that it

does not deny a remedy, or so embarrass it with conditions or restrictions as seriously to impair the value of that right."

While the loan commissioners had certain duties imposed on them as long as the funding act remained in force, the act itself was a mere offer or privilege which might be withdrawn. It was a remedy conferred, and it is elementary that there is no vested right in a remedy (Springfield *v.* Commissioners of Hampden, 6 Pick., 500). In the present case, although the privilege of funding the bonds has been taken away, the simple and effectual remedy of a suit in the courts of ordinary jurisdiction remains, and the bondholders are in just as favorable a position as though the bonds had been originally valid in 1883, before the funding commission was created.

The petitioners cited paragraph 2934 of the Arizona statutes above quoted, and from it argued that their "right to have funding bonds issued" could not be taken away, and further argued that the Utter case was "an action or proceeding theretofore taken."

But it is submitted that such argument is erroneous in assuming that the creation of the loan commission gave creditors any right that could not be divested by a repeal of the commission. Before the passage of the act of March 10, 1887, of course creditors had no "right" to exchange their evidences of indebtedness for the bonds authorized by such act to be issued. The legislature passed the funding law and permitted this to be done. If, before the evidences of indebtedness were funded, the law was repealed, the holders of such evidences of indebtedness were in as good a position as they were before the law was passed. No rights had been taken away from them and no contract was impaired, because no consideration had moved from either party to the other and the privilege of funding the indebtedness had never been carried into effect.

This is the rule announced in Tulley *v.* Trainor *et al.*, 53

Cal., 274, where the court construed the following California statute, which, as will be seen, is exactly like the Arizona act:

"No rights acquired or proceedings taken under the provisions repealed shall be impaired or in any manner affected by this repeal."

The court held that the "proceeding" referred to was "a proceeding whereby *some right had been acquired* and which could not be disregarded without affecting the right itself."

The court further said:

"The expression 'proceedings taken' is not the equivalent of 'suit commenced,' for if plaintiff had not a *vested right* to damages according to a certain standard before the action was brought, the mere commencement of the action did not create a new and vested right."

This language and reasoning seem controlling in the present case. If the petitioners had no vested right to fund the bonds, their demand on the loan commissioners did not create a new and vested right. Such demand was not a "proceeding theretofore taken," in the meaning of the statute, and the repeal of the loan commission did not affect any "right then existing or accrued," or any "proceeding theretofore taken."

As this case seems directly in point as to the proper construction of our statute, paragraph 2934, we cite it with confidence. It looks to us that under all the authorities it is impossible to hold that the funding was any "right" existing or accrued at the time of the repeal, nor can it be held that the demand on the defendant herein was any "proceeding taken." It was merely a proceeding begun or initiated and therefore inchoate.

Where the act of a legislature is spontaneous, and no service or duty or other remunerative condition was imposed on the beneficiary, it belongs to the class of laws de-

nominated *privilegia favorabilia*, and it is the nature of such a privilege that it exists *bene placitum*, and may be revoked at the pleasure of the sovereign.

Christ Church *v.* Phila. County, 24 How., 300.

This case was cited and approved in Newton *v.* Com'rs, *supra*, where the court said, referring to what was claimed as a contract for a vested right:

"It must not be a mere gratuity. There must be a sufficient consideration, or no matter how long the alleged right has been enjoyed, it may be resumed by the State at its pleasure."

As to this section 2934, it is respectfully suggested that between its provisions and the present state of facts there is a distinction which must adhere in the very nature of the case. Where rights have accrued they may survive, notwithstanding a repeal of the law, provided the tribunal before which the action was pending itself survives, but no action can survive and no alleged right be enforced where the tribunal itself is destroyed by the repealing law, and no jurisdiction is conferred on any other tribunal. In the latter case there is no one to act, and that is the present state of facts, because there are no loan commissioners in existence.

This repeal contained no saving clause, and the effect of it is to divest and destroy all inchoate interests which have arisen under it. "If a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law."

Gurley *v.* Patrick Co., 137 U. S., 141.

"The repeal of an act which authorizes a course of proceeding by a public officer invalidates the proceedings at whatever state they have arrived."

Williams *v.* Lincoln Co., 35 Me., 345.
Tivey *v.* People, 8 Mich., 128.
Lamb *v.* Schottler, 54 Cal., 319.

In *In re* Hall, petitioner, 167 U. S., 38, and cases therein cited, this court held that "the effect of the repealing act was to take away the jurisdiction of the Court of Claims to proceed further in any case founded upon the repealed act."

A suit pending to enforce a right or remedy conferred solely by statute is abated by the unconditional repeal of such statute before judgment rendered in such suit.

Yeaton *v.* U. S., 9 U. S., —; 5 Cranch, 281.
Norris *v.* Crooker, 54 U. S., —; 13 How., 429.

The correct rule of interpretation is that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule that all acts *in pari materia* are to be taken together as if they were one law.

U. S. *v.* Freeman, 3 How., 556.

Under this rule the act of June 6, 1896, is to be taken as though it were part of the act of June 25, 1890, of which it is an amendment, and is therefore "subject to future territorial legislation."

"No doubt a statute which is amended is thereafter, as to all acts subsequently done, to be construed as if the amendment had always been there, and the amendment itself so thoroughly become a part of the original statute that it must be construed in view of the original statute as it stands after the amendment is introduced and the matter superseded by the amendment eliminated."

Endlich on Interpretation of Statutes, sec. 204.

Under this rule the amendments enlarging the class of obligations which might be funded are to be considered as part of the original statute title XXXI, providing for funding, which statute was under the control of the Arizona legislature.

In order that one statute may have the effect of repealing another by implication, its conflict with the former act must be "so positive as to be irreconcilable by any fair, strict, or

liberal construction of it which would, without destroying its evident intent and meaning, find for it a reasonable field of operation, preserving, at the same time, the force of the earlier law, and construing both together in harmony with the whole course of legislation upon the subject."

Endlich, Interp. St., § 210.

The fair construction which we have suggested of the act of June 6, 1896, is that it validates certain indebtedness and permits it to be funded, and preserves at the same time the force of the Arizona statute creating the loan commission, and thus both can be construed together in harmony with the whole course of legislation upon the subject, which is that the legislatures have full power as to funding, and that Congress has merely added to its powers by permitting it to fund certain indebtedness which could not have been funded without such permission.

A case which seems quite analogous as to the legal principles involved is that of Board of Commissioners *v.* Ætna Life Insurance Company, 90 Fed., 222, 227. In that case the legislature of Kansas passed a special law in 1893, entitled "An act authorizing Seward county, Kansas, to refund its outstanding indebtedness existing on May 1, 1891, and still unpaid," providing that:

"The board of county commissioners of Seward county, Kansas, is hereby authorized and empowered to refund any and all outstanding indebtedness existing on May 1, 1891, and still unpaid, by issuing bonds to the holders of such outstanding indebtedness."

The court said:

"This act contains six sections, and prescribes the method in which the bonds shall be issued and paid, and is in itself complete, independent and effective. The purpose and effect of this enactment are plain, and the terms used to accomplish them are free from all ambiguity. They were to enable Seward county 'to refund any and all outstanding

indebtedness existing on May 1, 1891,' notwithstanding the limitation of the general law. What the legislature of 1891 could prohibit, the legislature of 1893 could permit, either in whole or in part. The effect of chapter 114 of the Laws of 1893 was to except Seward county from the terms of the limitation of the act of 1891. It did not repeal the general law, nor deprive the county of Seward of any of the powers and privileges granted to it in common with every other county in the State by that law; but it had the effect to confer upon Seward county the additional privilege of refunding all the debts it owed on May 1, 1891, although its bonded indebtedness already exceeded the limitation prescribed by the act of 1891. This conclusion is in accord with the settled rules of construction that, when there are two acts upon the same subject, they must stand together, if possible; that, if the two are repugnant in any of their provisions, the later act operates as a repeal of the former act so far, and only so far, as its provisions are repugnant to those of the earlier act (*In re* Henderson's Tobacco, 11 Wall., 652–657); that privileges granted by special act are not affected by inconsistent general legislation on the same subject, but the special act and the general laws must stand together, the one as the law of the particular case, and the other as the general law of the land (Gowen *v.* Harley, 6 C. C. A., 190–196; 56 Fed., 973–979, and 12 U. S. App., 574–584); and that 'all statutes *in pari materia* are to be read and construed together, as if they formed part of the same statute, and were enacted at the same time'" (Potter Dwar. Stat., 145).

In applying these principles to the present case we submit that the various acts of Congress waiving the limitations of the Harrison act and permitting additional indebtedness to be funded did not repeal the general law passed by the Arizona legislature, title XXXI, nor did the added privilege deprive the Territory of any of its powers as to the subject of funding. What Congress had prohibited by the Harrison act it could waive by the subsequent legislation, and that this is all that it intended to do and did do. The legislative will is to be ascertained not from the literal meaning of the words of the statute alone, but from the text as a whole, in-

terpreted in view of the general object and purpose of the act.

By act 74 of the Eighteenth Legislative Assembly (1895), the legislature gave the loan commissioners additional powers and duties and further legislated as to the commission in act No. 78 of 1897, all of which changes were acquiesced in by Congress, so that the practical construction which has been given to the provision for "future territorial legislation" would appear to be that the duration of the funding commission and the duties of the commissioners were under the unrestricted control of the Arizona legislature.

REPEAL OF THE COMMISSION.

Act No. 32 of the Twentieth Legislative Assembly of Arizona is as follows:

"An act to abolish the loan commission and to repeal sundry laws relating thereto.

"*Be it enacted by the Legislative Assembly of the Territory of Arizona:*

"SECTION 1. That paragraph 2039, section 1, chapter 1, title XXXI, of the Revised Statutes of the Territory of Arizona; also, that section 1 of act No. 79, Session Laws of the Sixteenth Legislative Assembly of the Territory of Arizona, also act No. 33 and act No. 74, Session Laws of the Eighteenth Legislative Assembly of the Territory of Arizona are hereby repealed.

"SEC. 2. This act shall take effect and be in force from and after its passage.

"This bill having been returned by the governor, with his objections thereto, and, after reconsideration, having passed both houses by a two-thirds vote of each house, has become a law this 13th day of March, A. D. 1899."

Paragraph 2039 is the one creating the loan commission, as follows:

"2039. (SEC. 1.) For the purpose of liquidating and providing for the payment of the outstanding and existing in-

debtedness of the Territory of Arizona, the governor of the said Territory, together with the territorial auditor and territorial secretary and their successors in office, shall constitute a board of commissioners to be styled the loan commissioners of the Territory of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided."

Section 1 of act No. 79 of the Sixteenth Legislative Assembly is as follows:

"An act to provide for funding territorial, county and other indebtedness and being supplemental to the act of Congress entitled 'An act approving with amendments the funding act of Arizona, approved June 25, 1890.'

"*Be it enacted by the Legislative Assembly of the Territory of Arizona:*

"SECTION 1. That the act of Congress entitled 'An act approving with amendments the funding act of Arizona,' approved June 25, 1890, be and the same is hereby re-enacted as of the date of its approval, subject to the modifications and additional provisions hereinafter set out, and to carry out the purpose and intention of said act of Congress, the loan commissioners of the Territory of Arizona shall provide for the liquidation, funding and payment of the indebtedness existing and outstanding on the 31st day of December, 1890, of the Territory, the counties, municipalities and school districts within said Territory by the issuance of bonds of said Territory, as authorized by said act, and all bonds issued under the provisions of this act and the interest thereon shall be payable in gold coin of the United States."

Act No. 33 of the Session Laws of the Eighteenth Legislative Assembly is entitled "An act to provide for funding territorial indebtedness only incurred since December 31, 1890, in accordance with an act of Congress entitled 'An act approving with amendments the funding act of Arizona, approved June 25, 1890,' and approved August 3, 1894."

Act No. 74 of the Eighteenth Legislative Assembly is en-

titled "An act to remedy defects in the records of the loan commission of the Territory of Arizona."

According to the views which we have submitted herein, the loan commission was the creation of the Territory of Arizona. Paragraph 2039 established the commission, and the other paragraphs of title XXXI defined its powers and duties. Paragraph 2039, we have submitted, was not repealed by the act of June 25, 1890, which re-enacted it, nor was it repealed by any other act till act No. 32. When that act was passed the commission was abolished, because it was only by virtue of paragraph 2039 that there are any commissioners. That paragraph is the basis of every act relating to funding. A territorial legislature may declare vacant an office which it has created even during the term of the incumbent (People *v.* Van Gaskin, 5 Mont., 352). Most clearly it can abolish an office where no term is fixed.

The act of the Arizona legislature repealing the loan commission was brought to the special attention of Congress and was not disapproved. On the contrary, the construction was given to it for which we have contended. The following report shows the views expressed and action taken by Congress regarding this matter:

56TH CONGRESS, 1*st Session.* } HOUSE OF REPRESENTATIVES. { *Report No.* 1473.

Issue of Bonds by Supervisors, Pima County, Ariz.

May 14, 1900.—Referred to the House calendar and ordered to be printed.

Mr. Finley, from the Committee on the Territories, submitted the following:

Report.

(To accompany H. R. 8068.)

The Committee on the Territories, to whom was referred the bill (H. R. 8068) authorizing the board of supervisors of Pima county, Ariz., to issue fifty-year 5 per cent. bonds of

Pima county, Ariz., to redeem certain funded indebtedness of said county, beg leave to submit the following report and recommend that said bill do pass:

The first act bearing on this subject is the act of the territorial legislature approved March 10, 1887, providing for outstanding indebtedness.

It provided for a loan commission to perform the duties prescribed by the act in the funding of indebtedness, the commission to be composed of the governor, territorial auditor, and territorial secretary.

For existing indebtedness due and to become due, the commission was empowered to issue negotiable coupon bonds of $1,000 each, with interest to be fixed by the commission.

This act, of course, provides for the whole procedure in the issuance of these bonds, providing for their final payment within twenty-five years as the commissioners might fix (Revised Statutes of Arizona, p. 361).

Under this act, in 1887, Pima county issued $300,000 worth of 7 per cent. bonds, and later the loan commission funded $103,000 of them in 5 per cent. fifty-year bonds, and $147,000 of them are yet unfunded, the first installment of which, $25,000, falls due June 30, 1901, the levy for which, if this bill is not passed, will have to be made in August next.

In 1890 this act of the territorial legislature was amended by Congress (U. S. Stat. L. 26, p. 175) so as to authorize the loan commission to issue bonds bearing interest not to exceed 5 per cent., and authorized the commission, on the request of counties and municipalities, to issue territorial bonds in lieu of their indebtedness to run fifty years, and to open up an account of the same with the counties and municipalities of the Territory, assuming their original obligation.

This act so amended, and approved as amended, provided that the same as amended, and the same is hereby approved and confirmed, subject to future territorial legislation.

Now, following this, the territorial legislature, March 19, 1891, passed an act approving of this funding act of the Territory enacted by Congress, amending chapter 1 of title 31 of the Revised Statutes, before referred to, and set the matter in motion as enacted by Congress and submitted to

territorial legislation afterwards (act 79, at page 97, Session Laws of Arizona of 1891).

Following that, on June 6, 1896, Congress passed an act amending and extending the provisions of the act of Congress before named to the territorial indebtedness, providing that the acts of Congress approved June 25, 1890, and August 3, 1894, authorizing the funding of the indebtedness of Arizona, be amended so as to authorize the funding of outstanding obligations of the Territory and to counties, municipalities, etc., until January 1, 1897, providing that all outstanding bonds, warrants, and other evidences of indebtedness of the Territory, counties. etc., heretofore authorized by legislative enactment of the Territory, bearing a high rate of interest, might be refunded into bonds bearing a lower rate. This might be done up to January 1, 1897, remember. That is its limitation.

After this act the general funding act before referred to, enacted by Congress, having provided that it should all be subject to future legislation, was again passed upon by legislature in 1899, found at page 39 of the laws of that session.

There they pass an act called "An act to abolish the loan commission and to repeal sundry laws thereto." The act was that paragraph 2039, section 1, chapter 1, title 31, of the Revised Statutes of Arizona, the one heretofore referred to, and also that section 1 of act 79, Session Laws of the Sixteenth Legislative Assembly heretofore referred to, and acts 33 and 74 of the Session Laws of the Eighteenth Legislative Assembly of the Territory, referring to all of the funding acts, are hereby repealed. It repealed them all, and in that condition we are now.

Now, in view of the fact that Congress, in amending and re-enacting the funding law of Arizona, as before stated, provided that it should be subject to the future legislation of the Territory, and in view of the further fact that Congress in 1896 provided the limitation for funding the outstanding indebtedness at the date of January 1, 1897, and of the further fact that the legislature of Arizona, to whose jurisdiction Congress referred this funding business and subjected it to its power, repealed all these laws outright, we submit that the board of supervisors now have no authority under existing laws to issue bonds for the refunding of Pima county's indebtedness.

In view of the foregoing facts the passage of the bill is respectfully recommended.

DO THESE BONDS COME WITHIN THE PROVISIONS OF THE ACT OF JUNE 6, 1896?

This court said in Utter *v.* Franklin that the memorial of the Arizona legislature was proper to be considered in construing the act of Congress passed in relation thereto. That memorial specifically refers only to bonds the validity of which "for many years after the issuance was unquestioned and acknowledged by the payment of the interest thereon as it fell due."

It is clear that these Narrow Gauge bonds do not come within the intent of the memorial, because the findings of fact show (rec., pp. 98, 101, 102) that no interest was ever paid on any of the bonds. The treasurer of the railroad company testified (rec., p. 98) that he "made several applications to the treasurer of Pima county to pay the interest on these bonds, but he refused, and the railroad company never received any money from the county treasurer or from anybody else on these bonds."

The Arizona legislature, finding that an attempt was made to include the bonds in question in the provisions of the act of June 6, 1896, passed the following memorials in 1897 and 1899 (Council Memorial No. 3, 19th Legislative Assembly, Laws 1897, p. 146, and House Memorial No. 1, 20th Legislative Assembly, Laws 1899, p. 89):

COUNCIL MEMORIAL NO. 3.

To His Excellency, the President of the United States:

SIR: We, your memorialists, the Nineteenth Legislative Assembly of the Territory of Arizona, urgently request you to veto the act of Congress legalizing Arizona bonds. The Supreme Court declared them invalid and void in the case of Lewis *v.* Pima County, 155 U. S. Reports, page 54. The facts could not have been fairly presented to Congress and the result as it is. The people of Arizona look to you now

for salvation in the exercise of the veto power so wisely exercised by Your Excellency.

D. G. CHALMERS,
Speaker of the House.

FRED G. HUGHES,
President of the Council.

HOUSE MEMORIAL NO. 1.

To the Senate and House of Representatives of the United States of America, in Congress Assembled:

Your memorialists, the Legislative Assembly of the Territory of Arizona, beg leave to submit to your honorable body that,

Whereas, a memorial was presented to your honorable bodies by the Eighteenth Legislative Assembly of the Territory of Arizona regarding bonds issued by certain counties of said Territory, which memorial was intended to apply only to such bonds as had been bought in good faith, and interest on which had been paid as stated in the aforesaid memorial; and

Whereas, in response to said memorial your honorable bodies thereafter passed the act entitled "An act amending and extending the provisions of an act of Congress entitled An act approving, with amendments, the funding act of Arizona," approved June 6th, 1896; and

Whereas, based on said memorial and act of June 6, 1896, the Supreme Court of the United States has recently rendered a decision tending to recognize the validity of certain bonds issued by Pima county, Arizona Territory, to the Arizona Narrow Gauge railroad, under the provisions of the act of the Legislative Assembly of the Territory of Arizona, approved February 1, 1883, and

Whereas, before the passage of said memorial said bonds had been declared unauthorized and void by the district court of the first judicial district of the Territory of Arizona, in and for Pima county, by the supreme court of the Territory of Arizona and by the Supreme Court of the United States, in the case of Lewis *v.* The County of Pima, decided in the Supreme Court of the United States at its October, 1894, term; and

Whereas, said bonds issued to said Arizona Narrow Gauge

Railroad Company were never acquired by said county (company) in good faith, and were never sold by it in good faith or for a valuable consideration, and none of the interest on said bonds had ever been paid by Pima county, and the validity of said bonds had never been acknowledged by said county, and

Whereas, the said Arizona Narrow Gauge Railroad was never built and never existed, and Pima county has never received any consideration whatever for the said so-called bonds, and the entire scheme of the said bond issue was a fraud without any element of merit or good faith, and

Whereas, all the foregoing facts were and are notorious, and within the knowledge of every one who has ever had any dealings with said bonds, and

Whereas, it was by all the members of the legislature passing said memorial and by the governor of Arizona at the time, and by the then delegate in Congress from Arizona, believed that all of said bonds so issued by Pima county to the Arizona Narrow Gauge Railroad Company were *res adjudicata* by the said decision of the Supreme Court of the United States, and that none of the said bonds could be thereafter validated, and

Whereas, said memorial was intended to apply only to certain railway aid bonds of two other counties in Arizona, where the aided railways were actually constructed, and not to the said bonds so issued by Pima county, as to which none of the statements or reasons in said memorial applied, and which bonds were then as now believed to be without consideration, unjust, fraudulent and void.

Therefore, we most strongly urge upon the Senate and House of Representatives of the United States of America to pass such legislation as will exclude from the provisions of the act of Congress of June 6th, 1896, and from any and all other legislation by Congress the said bonds so issued by Pima county to the Arizona Narrow Gauge Railroad Company, so that neither said act of June 6th, 1896, or any other act will be construed so as to validate the said bonds issued by Pima county; and it is further,

Resolved, That our delegate to Congress be and is hereby instructed to use all proper means to bring this subject to the careful and immediate consideration of Congress, in order to secure, if possible, from Congress such legislation as is prayed for herein, and that the secretary of the Terri-

tory be and he is hereby requested to transmit a copy of the foregoing memorial to each House of Congress and to our delegate in Congress.

It is further shown by the findings of fact (rec., p. 102) that the present owners of the coupons, Coler & Co., bought them as they matured, with full notice that the first coupons had been protested, and that the bonds had been repudiated by Pima county from the start.

It was further shown (rec., pp. 102 and 103) that the firm of Coler & Co., W. N. Coler, Jr., and the North American Loan and Trust Company acquired their holdings under facts showing full notice and knowledge of the invalidity of the bonds.

The funding act of June 6, 1896, legalizes certain bonds, provided such bonds had been sold or exchanged in good faith and in compliance with the terms of the act of the legislature by which they were authorized.

Even if these bonds were exchanged in literal or technical compliance with the terms of the act, it is respectfully submitted that they were not exchanged "in good faith." The legislation under and by which these bonds were issued must rest upon the theory that the road would be a benefit to the local community (Elliott on Railroads, par. 877). It could not have been in contemplation that bonds were to be exchanged simply for ten miles of poorly laid track ending on the mesa. It was the purpose to aid in the construction of the road as per the route named in the articles of incorporation.

ROAD NOT FINISHED.

The findings of fact show (p. 98) that the incorporators of said railroad company had no way in which they could reasonably count on having this road built; that they had no funds promised or secured with which to complete the road

at the time, and no arrangement with any capitalists or any syndicate by which the money was to be furnished to complete the road; that they did not expect to put in the money themselves and had no idea where they were to get it.

The estimates attached to the original articles of incorporation show that it would take over $2,000,000 to build and equip the road, of which amount the projectors spent a little more than half of one per cent.

Taking the memorial into consideration in construing the act of June 6, 1896, it is submitted that the words "in good faith" refer to cases where the railroads had been completed, and do not include such a case as this.

Furthermore, it is shown by the eighth finding of fact (rec., p. 99) that the firm of Coler & Co. took all the assets of the road with full knowledge of the repudiation of the bonds, and through one J. Alden Gaylord, agent of Coler & Co., represented that at least 30 miles of the road would be finished during the summer of 1886. Color & Co. became stockholders in the Arizona Narrow Gauge Railroad Company on August 9, 1886. The ostensible contractor, W. W. Walker, "did not have sufficient means to build thirty miles of the said railroad, and that Coler & Co. knew this fact." The findings further show (rec., p. 100) that this firm of Coler & Co. agreed to build the first thirty miles of the railroad, but that after they got the bonds of Pima county they refused to proceed farther on the lines originally agreed upon, and no more work was done on the railroad, and Coler & Co. never even rendered an account showing the amount of money advanced by them and for what purposes.

In Wood *v.* Guaranty Trust Company, 128 U. S., 416, 423, this court found no difficulty in holding that one Starr "was essentially (that is, from a business point of view) the water works company." There can be no difficulty in holding in this case that Coler & Co. were the railroad company, to all intents and purposes. All the expenses of litigation

heretofore have been advanced by Coler & Co., and "it is further found that, except Elizabeth B. Voorhees, the other owners of these bonds have never been charged with any moneys advanced by Coler & Co. in regard to such bonds or expenses incurred by Coler & Co. in carrying on any litigation" (rec., p. 105).

It is respectfully submitted that the agreement under which this litigation is being urged is such that plaintiffs ought not to be allowed to maintain it. The findings of fact show (rec., pp. 103, 104) that Coler & Co. are to advance all expenses, and as to the owners of the bonds it is understood that they "are not to assume any expense whatever in the event of the failure of Coler & Co. to secure a settlement or enforcement of this indebtedness."

Respectfully submitted.

ROCHESTER FORD,
Of Counsel for Appellants.

APPENDIX.

No. 35.

An act to promote the construction of a certain railroad.

Be it enacted by the Legislative Assembly of the Territory of Arizona:

SECTION 1. Upon information in writing to the chairman of the board of supervisors of Pima county, Arizona Territory, by the president of the Arizona Narrow Gauge Railroad Company, the corporation of that name which filed its articles of association with the secretary of said Territory, on the 23d day of November, A. D. 1882, that said railroad company is ready to exchange bonds with the said county of Pima, according to the provisions of this act, it shall be the duty of said chairman, and he is hereby directed to call a meeting of said board, to be held within five days after the receipt of said notification, and it shall be the duty of said board of supervisors, and they are hereby directed to meet within five days, at the county-seat of said county, and then and there to order issued two hundred thousand dollars of bonds of said county, in denominations of one thousand dollars each, and bearing interest at the rate of seven per cent. per annum, interest payable semi-annually, the principal payable in twenty years, which said bonds and interest coupons thereto attached shall be signed by said chairman and the clerk of said board, and shall, within thirty days after the said order of issuance thereof has been made, be delivered by the clerk of said board to the county treasurer of said county of Pima, to be by him disposed of as hereinafter provided, and said county treasurer shall receipt to the said clerk for the said bonds.

SEC. 2. Upon the application of said railroad company to the said treasurer, and the tender by said company of fifty thousand dollars of the first-mortgage bonds of said company in like denominations, bearing like interest and payable in like time as those of said county, it shall be the duty

of said treasurer, and he is hereby directed to deliver fifty thousand dollars of bonds of said county to the president and secretary of said railroad company, in exchange for fifty thousand dollars of the first-mortgage bonds of said railroad company, so tendered as above provided. And whenever and so often as five each miles of said railroad shall have been graded, laid with ties and iron, said treasurer shall upon proof thereof, which proof shall be the certificate of the county surveyor to that effect, exchange with the said president and secretary of said railroad company fifty thousand dollars of said bonds of said Pima county for fifty thousand dollars of said bonds of said company, for each five miles so completed, until the two hundred thousand dollars of bonds of said Pima county are exchanged for a like number of bonds of said railroad company.

SEC. 3. The said bonds herein provided to be issued by the said county of Pima shall be issued in the name of said county, and shall be made payable to bearer twenty years after date, and shall be made payable, both principal and interest, at the office of the county treasurer of said county issuing the same. The said bonds and coupons, in addition to being signed by the chairman and clerk of the board of supervisors of said county, shall be also signed by the recorder of said county, who shall affix to each bond the seal of his office.

SEC. 4. The said board of supervisors of Pima county, issuing bonds as aforesaid, are hereby authorized and directed, at their first regular meeting, after the issuance of the same, and in each year thereafter, until the said bonds are paid, in case there should not be sufficient moneys in the railroad fund, hereafter provided for, to pay the annual interest upon said bonds, to levy for each year a tax sufficient to meet any deficiency in said railroad fund to pay said interest, which tax, however, shall not be more than twenty cents upon each one hundred dollars of taxable property in the above-named county, which tax shall be levied and collected in the manner as is, or may hereafter be provided by law for the levying and collecting of other territorial and county taxes in said county, and which tax shall be known as the railroad deficiency interest tax, and the proceeds of said tax, together with the interest received by said county on the bonds of said railroad company, held by said county, shall constitute a fund to be applied only to the payment of

the interest on and redemption of the bonds provided for in this act to be issued by said county, and shall constitute the fund heretofore mentioned and be known as the railroad fund.

SEC. 5. The bonds of said railroad company hereinbefore provided for to be tendered and exchanged for the bonds of Pima county shall be secured by a deed of trust or mortgage to at least two trustees, of all the property, real and personal, owned by said railroad company, at the time of the issuance of said bonds, or that may thereafter be acquired, including, also, all franchises and privileges of whatsoever kind or nature, and which said deed of trust or mortgage shall be the first made of or on said property, and said bonds of said company shall be issued in the name of said company, and shall be made payable to bearer twenty years after date, and shall have interest coupons thereunto attached, and shall be made payable, both principal and interest, at the office of said company in the city of Tucson, in the county of Pima. And said deed of trust or mortgage shall provide that no more bonds than the amount of thirteen thousand dollars per mile, to be secured by said deed of trust or mortgage, shall be issued by said railroad company.

SEC. 6. Whenever, in the judgment of the board of supervisors of Pima county, it may be deemed advisable to sell any or all of the bonds of said railroad company, received in exchange by them, as aforesaid, they are hereby authorized and empowered to direct the treasurer of said county to advertise in a newspaper published in said county for the space of four weeks, for sealed proposals for the purchase of any or all of said bonds of said railroad company; and ten days after the said notice shall have been published as aforesaid, the treasurer shall open the said proposals, and shall sell said bonds to the highest bidder therefor, in such lots as he may be directed by said board of supervisors, and the proceeds of such sale shall be placed in the said railroad fund to pay the interest and principal on the respective bonds of said county; *provided, however*, that the treasurer may reject any and all bids; *and, provided, further*, that no sale of such bonds shall be concluded until confirmed and approved by the board of supervisors by an order entered upon its minutes.

SEC. 7. Whenever, after the payment out of said railroad

fund of the semi-annual interest on the said bonds, there shall be any money left in said railroad fund, it shall be the duty of the treasurer of said county to advertise in a newspaper published in said county, for the space of four weeks, for sealed proposals to surrender any of the bonds of the said county, and ten days after such notice shall have been published as aforesaid, the treasurer shall open the said proposals, and shall redeem the bonds of said county, so far as the said fund on hand may be sufficient; *provided*, those offered to be surrendered at the lowest rates, shall be redeemed first; *and, provided, further*, that none shall be redeemed at a price exceeding the par value of said bonds.

SEC. 8. If, for any reason, the board of supervisors of the county herein named fails to meet at the times herein designated it shall be the duty of said board to meet on each succeeding Monday thereafter until the acts provided to be done by said board, under the provisions of this act, have been fully done and completed, and all the acts of said board so done in the premises, subsequent to the times hereinbefore designated, shall be as valid as though done within the time hereinbefore prescribed.

SEC. 9. A copy of the articles of association, certified by the secretary of the Territory of Arizona, of the Arizona Narrow Gauge Railroad Company, and endorsed as filed by said secretary on the 23d day of November, A. D. 1882, shall be sufficient proof to the board of supervisors of Pima county or officers herein named of the identification of said Arizona Narrow Gauge Railroad Company herein mentioned. The route of said road shall in all respects, so far as practicable, conform substantially to the route set forth in the articles of incorporation of said company now on file in the office of the secretary of this Territory.

SEC. 10. This act shall take effect and be in force from and after its passage.

Approved February 21st, 1883.

No. 56.

An act supplemental to an act entitled "An act to promote the construction of a certain railroad," approved February 21st, 1883.

Be it enacted by the Legislative Assembly of the Territory of Arizona:

SECTION 1. The incorporators of the said railroad company known in said act as the Arizona Narrow Gauge Railroad Company, are hereby authorized and empowered to construct said road either as a narrow-gauge or standard-gauge railroad, as to them shall seem advisable and expedient, and the provisions of said act, approved February 21st, A. D. 1883, to promote the construction of a certain railroad, are extended in every particular to the said company.

SEC. 2. The said company upon exhibiting to the board of supervisors of Pima county, Arizona, or officers named in said act referred to, a certified copy of their articles of incorporation filed in the office of the territorial secretary, providing for the construction of a standard or narrow gauge railroad, shall be entitled to all the benefits conferred upon them by the provisions of said act.

SEC. 3. This act shall take effect and be in force from and after its passage.

Approved March 6th, 1883.

TITLE XXXI.

Funding.

CHAPTER ONE.

Territorial Indebtedness.

(Approved March 10th, 1887.)

2039. (SEC. 1.) For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the Territory of Arizona, the governor of the said Territory, together with the territorial auditor and territorial secretary and their successors in office, shall con-

stitute a board of commissioners to be styled the loan commissioners of the Territory of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided.

2040. (SEC. 2.) It shall be, and is hereby declared the duty of the loan commissioners to provide for the payment of the existing territorial indebtedness due and to become due, and for the purpose of paying, redeeming and refunding all or any part of the principal and interest, or either, of the existing and subsisting territorial legal indebtedness, and also that which may, at any time, become due, the said commissioners shall from time to time, issue negotiable coupon bonds of this Territory, when the same can be done at a lower rate of interest and to the profit and benefit of the Territory.

2041. (SEC. 3.) Said bonds shall be issued as near as practicable in denominations of one thousand dollars, but bonds of a lower denomination, not less than two hundred and fifty dollars, may be issued when necessary. Said bonds shall bear interest at a rate to be fixed by said loan commissioners, but in no case to exceed six and one-half ($6\frac{1}{2}$) per cent. per annum, which interest shall be paid in gold coin or its equivalent in lawful money of the United States, on the 15th day of January in each year at the office of the territorial treasurer, or at such bank in the city of New York in the State of New York, or in the city of San Francisco, in the State of California, as may be designated by said loan commissioners, at the option of the purchaser of said bonds, the place of payment being mentioned in said bonds. The principal of said bonds shall be made payable in lawful money of the United States, within twenty-five years after the date of their issue. They shall bear the date of their issue, state when, where, and to whom payable, rate of interest and when and where payable, and shall be signed by said loan commissioners, and shall have the seal of the Territory affixed thereto, and countersigned by the territorial treasurer and bear his official seal, and shall be registered by the territorial auditor in a book to be kept by him for that purpose, and the faith and credit of the Territory is hereby pledged for the payment of said bonds, and the interest accruing thereon, as herein provided.

2042. (SEC. 4.) Coupons for the interest shall be attached to each bond so that they may be removed without injury

or mutilation to the bond. They shall be consecutively numbered and bear the same number of the bond to which they are attached, and shall be signed by the territorial treasurer. The said coupons shall cover the interest expressed in said bonds from the date of issue until paid; but in no case shall said bonds bear interest, nor shall any interest be paid thereon for any time before their delivery to the purchaser as hereinafter provided.

2043. (SEC. 5.) Whenever the said loan commissioners shall have decided to refund or redeem all or any part of the existing indebtedness of this Territory, they shall direct the territorial treasurer to advertise for a sale of the bonds to be issued for that purpose, by causing a notice of such sale to be published for the period of one month in some daily newspaper published at the capital of the Territory, and, at least, one insertion in a newspaper published in the city of New York in the State of New York, and in the city of San Francisco, in the State of California, such notice shall specify the amount of bonds to be sold, the rate of interest they shall bear, the place, day and hour of sale and that bids will be received by said treasurer for the purchase of said bonds, within one month from the expiration of such publication; and at the place and time named in said notice, the said treasurer and loan commissioners shall open all bids received by him and shall award the purchase of said bonds, or any part thereof, to the highest bidder or bidders therefor; *provided*, that said loan commissioners shall have the right to reject any and all bids; *and provided, further*, that they may refuse to make any award unless sufficient security shall be furnished by the bidder or bidders for the compliance with the terms of their bids.

2044. (SEC. 6.) When a sale of said bonds shall be awarded by the loan commissioners, they shall provide and procure the necessary bonds as in this act provided, and any expense incurred by them therefor, for the publication of said notices, costs of remitting funds for the payment of interest or money on said bonds, and all other necessary incidental expenses under the provisions of this act, shall be paid out of the general fund of said Territory, upon the order of the territorial auditor, and a sum of money sufficient to cover said costs and expenses is hereby appropriated out of said fund. They shall, from time to time, after signing said bonds, deliver them to the territorial treasurer taking his

receipt therefor, and charge him therewith. The said treasurer shall give to the Territory of Arizona an additional official bond with two or more sureties in a sum equal to the amount of bonds issued under this act, delivered to him by the said loan commissioners, which bond shall be approved by the governor and deposited and filed with the secretary of the Territory and recorded by him in a book to be kept for that purpose. And the said treasurer shall stand charged upon his official bond for the faithful performance of the duties required of him under this act.

2045. (SEC. 7.) The territorial treasurer shall sell said bonds for cash, or exchange them for any of the territorial indebtedness for the redemption of which they were so issued, but in no case shall said bonds be sold or exchanged for less than their face or par value and the accrued interest at the time of disposal, nor must any territorial indebtedness be redeemed at more than its face value and any interest that may be due thereon. The said treasurer shall indorse, by writing or stamping in ink on the face of the paper, evidencing the indebtedness received by him in exchange for said bonds, the time when and the amount for which exchanged.

2046. (SEC. 8.) All moneys so received by said treasurer, from a sale of such bonds, shall be applied by him exclusively to the redemption of the territorial indebtedness for the redemption of which such bonds were issued, and the treasurer shall give notice, as is provided by law in case of payment and redemption of territorial warrants, of his readiness to redeem such indebtedness, and thereafter interest on all such indebtedness due and outstanding shall cease.

2047. (SEC. 9.) There shall be levied annually upon the taxable property of this Territory, and in addition to the levy for other authorized taxes, a sufficient sum to pay the interest on all bonds issued and disposed of in pursuance of the provisions of this act, to be placed by the territorial treasurer in a fund to be known as the "interest fund." And ten years after such bonds shall have been issued such additional amounts shall be levied annually as will pay ten per cent. of the total amount issued until all the bonds issued under the provisions of this act are paid and discharged.

The territorial board of equalization, if there be one, if not then the territorial auditor, shall determine the rate of

tax to be levied in the different counties in the Territory to carry out the provisions of this act, and shall certify the same to the board of supervisors in each county and the said board of supervisors are hereby directed and required to enter such rate on the assessment-roll of their respective counties in the same manner and with the same effect as is provided by law in relation to other territorial and county taxes. Every tax levied under the provisions or authority of this act is hereby made a lien against the property assessed, which lien shall attach on the first Monday in March in each year, and shall not be satisfied or removed until such tax has been paid. All moneys derived from taxes authorized by the provisions of this act shall be paid into the territorial treasury, and shall be applied:

First. To the payment of the interest on the bonds issued hereunder.

Second. To the payment of the principal of such bonds.

Provided, That all moneys remaining in the "interest fund" after the payment of the interest in each year, for the first ten years after the issuance of any bonds under this act, and all moneys remaining in the "redemption fund" after all of said bonds shall have been paid and discharged, shall be transferred by the territorial treasurer to the territorial general fund.

2048. (SEC. 10.) Whenever after the expiration of the ten years from the date of issuance of any bonds under this act, there remains, after the payment of interest, as provided in the preceding section, a surplus of ten thousand dollars or more, it shall be the duty of the territorial treasurer to advertise, as in manner of the advertising by the loan commissioners for bids, for sale of bonds, which advertisement shall state the amount of money in the said redemption fund, and the number of bonds, numbering them in the order of their issuance, commencing at the lowest number then outstanding, which such fund is set apart to pay and discharge, and if such bonds, so numbered in such advertisements, shall not be presented for payment and cancellation, at the expiration of such publication, then such fund shall remain in the treasury to discharge such bonds whenever presented, but they shall draw no interest after the expiration of such publication. Before any such bonds shall be paid they shall be presented to the territorial auditor, who shall endorse, on each bond, the amount due

thereon, and shall write across the face of each bond, the date of its surrender, and the name of the person surrendering. The territorial auditor shall keep a record of all bonds issued and disposed of by the territorial treasurer, showing their number, rate of interest, date and amount of sale, when, where and to whom payable, and if exchanged, for what, and when presented for redemption, the date, amount due thereon and person surrendering.

2049. (SEC. 11.) When the treasurer pays or redeems any territorial indebtedness, he shall endorse, by writing or stamping in ink, on the face of the paper evidencing such indebtedness, so paid or redeemed, the words "redeemed and cancelled," with the date of cancellation. He shall keep a full and particular account and record of all his proceedings under this act, and of the bonds redeemed and surrendered, and he shall transmit to the governor an abstract of all his proceedings under this act with his annual report, to be, by the governor, laid before the legislature at its meeting. All books and papers pertaining to the matter provided in this act, shall, at all times, be open to the inspection of the party interested or the governor, or a committee of either branch of the legislature, or a joint committee of both.

2050. (SEC. 12.) It shall be the duty of the territorial treasurer to pay the interest on said bonds when the same falls due out of the said interest fund, if sufficient, and if said fund be not sufficient then to pay the deficiency out of the general fund; *provided*, that the territorial auditor shall first draw his warrant on the territorial treasurer, payable to the order of said treasurer, for the amount of such deficiency out of the general fund, which said interest warrant shall be drawn at least one month previous to the maturing of the interest.

2051. (SEC. 13.) It shall be the duty of said board of loan commissioners to make a full report of all their proceedings had under the provisions of this act to the governor on or before the first day of January of each year, and said reports shall be transmitted by the governor to the Territorial Legislative Assembly.

2052. (SEC. 14.) No bond issued under the provisions of this act shall be taxed within this Territory.

(Took effect immediately.)

No. 79.

An act to provide for funding territorial, county and other indebtedness and being supplemental to the act of Congress entitled "An act approving with amendments the funding act of Arizona," approved June 25, 1890.

Be it enacted by the Legislative Assembly of the Territory of Arizona:

SECTION 1. That the act of Congress entitled "An act approving with amendments the funding act of Arizona," approved June 25th, 1890, be and the same is hereby now re-enacted as of the date of its approval, subject to the modifications and additional provisions hereinafter set out, and to carry out the purpose and intention of said act of Congress, the loan commissioners of the Territory of Arizona shall provide for the liquidation, funding and payment of the indebtedness existing and outstanding on the 31st day of December, 1890, of the Territory, the counties, municipalities and school districts within said Territory, by the issuance of bonds of said Territory, as authorized by said act, and all bonds issued under the provisions of this act and the interest thereon shall be payable in gold coin of the United States.

SEC. 2. Whenever the said loan commissioners shall redeem, refund or pay any indebtedness of a county, municipality or school district, or issue bonds to such county, municipality or school district as authorized by said act of Congress, the territorial treasurer shall open and keep an account with said county, municipality or school district, and shall at once make out and transmit to the proper officer or officers charged with the administration of the affairs of said county, municipality or school district, a statement under his official seal, showing the amount and character of the indebtedness of said county, municipality or school district, refunded or paid, the amount of bonds issued therefor, when due and payable, rate of interest and amount of interest that will be required to be paid annually thereon. And said officer or officers shall file said statement in the proper office as a record therein.

SEC. 3. In all cases of funding and paying the indebtedness of any county or school district in such county, the board of supervisors of such county, or, of funding and paying

the indebtedness of any municipality, the executive or other proper officer or officers of such municipality, shall annually, at the time of assessing and levying taxes therein, cause to be assessed and levied each year upon the taxable property of the county in case of county indebtedness, municipality in case of municipal indebtedness, and school district in case of school-district indebtedness, and in addition to other authorized taxes, a sufficient sum to pay the interest on the bonds issued and disposed of under the provisions of this act, for the benefit of such county, municipality or school district respectively. And fifty (50) years after such bonds shall have been issued, such additional amount shall be levied, annually, as will pay ten per cent. of the total amount issued until all the bonds issued under the provisions of this act are paid. And all taxes shall be assessed, levied and collected as other county, municipal and school-district taxes are collected, and shall be paid into the territorial treasury.

SEC. 4. If sufficient money shall not be realized each year from the collection of taxes to pay the interest on said bonds when due, the deficiency shall be paid out of the money, fund or funds, used for defraying the general expenses of such county, municipality or school district, for funding, redemption and payment of whose indebtedness said bonds were issued, which said deficiency shall be paid by the proper officer or officers in charge of said money, fund or funds, upon the official demand thereof by the territorial treasurer. All money collected in any county, municipality or school district, for the payment of said interest remaining after such payment, shall be paid into said fund or funds used for the general expenses of such county, municipality or school district.

SEC. 5. It shall be the duty of the respective county, municipal and school district officers, whose duty it is to levy and collect the taxes therein, to levy and collect the tax in this act provided for the payment of the principal and interest of said bonds when due and payable and to pay the same into the territorial treasury at the time and times of the payment of the territorial taxes. Any failure to comply with the conditions and provisions of this act by any officer or officers charged with the performance thereof, or any neglect or refusal by him or them to levy, collect or pay over such taxes as aforesaid, or to apply the money collected

under this act otherwise than for the purpose for which it was collected, shall be deemed a misdemeanor and upon conviction in a court having jurisdiction thereof, the person so convicted shall be fined in an amount equal to the sum that should have been levied and collected, or for any misappropriation of the moneys so collected, in an equal amount to the sum not applied as in this act provided, and imprisoned as in other cases of misdemeanor, in the discretion of the court. And if the said proper officer or officers shall fail to levy the taxes as in this act provided he or they may be compelled to perform such duty by any court having jurisdiction thereof. Provided, that in case of such failure, the territorial board of equalization, or, upon their failure to act, the territorial auditor shall levy sufficient taxes in the different counties, municipalities and school districts to carry out the provisions of this act and the act of which this is supplemental. Said board and auditor, or either of them, may require the proper officer or officers of the county, municipality or school district, whose indebtedness has been refunded, and it shall be their duty to furnish said board or auditor such information as will enable said board or auditor to carry out the provisions of this act and said act of Congress. When the tax is so levied by the territorial board of equalization or territorial auditor, he or they shall transmit to the board of supervisors, in the case of the county and school district tax, and to the proper officers in the case of municipal tax, or to such other officer or officers exercising like duties, a statement of the rate of taxes fixed and levied upon the property within said county, municipality or school district, for the purpose aforesaid, and the proper county, municipal and school district officers shall enter upon the tax-roll and proceed to collect the tax levied, as other county, municipal and school district taxes are collected.

SEC. 6. The board of supervisors of each county shall fix and define the boundaries of each school district within the county, and all taxable property and the increase thereof, within the limits of each county, municipality or school district, is hereby pledged to the payment of any and all bonds and the interest thereon issued for the benefit of such county, municipality or school district respectively. And

in the event of the division, disincorporation or dissolution in any manner of any such county, municipality or school district, the board of supervisors of each county, or other board of officers exercising the like duties, and in case of their failure to act, then the territorial board of equalization, and upon their failure to act the territorial auditor or other officer exercising the like duties, shall cause the proper taxes to be assessed and levied upon the taxable property within the limits of such county, municipality or school district, at and from the time of the issuance of the bonds for its benefit, to meet the payment of such bonds and the interest thereon.

SEC. 7. Any person holding bonds, warrants or other evidence of indebtedness of the Territory of any county, municipality or school district within the Territory, existing and outstanding on the 31st day of December, 1890, may exchange the same for the bonds issued under the provisions of this act at no less than their face or par value and the accrued interest at the time of exchange; but no indebtedness shall be redeemed at more than its face value and any interest that may be due thereon.

SEC. 8. The provisions of said act of Congress relating or applying to the liquidation, refunding and redeeming of the territorial indebtedness, sale or exchange of bonds, receiving and applying the proceeds, shall apply and be the method used for the liquidation, refunding and redeeming the payment of the indebtedness of the counties, municipalities and school districts of this Territory authorized and contemplated by said act. And the loan commissioners shall at no time issue to any county, municipality or school districts any bonds created under this act or said act of Congress, without requiring from the officer or officers receiving the same, a bond as is required of the territorial treasurer, by section 6 of said act of Congress; and the said officer or officers shall give such bond, and no bonds shall be issued to any county, municipality or school district except in exchange for the bonds, warrants or other evidences of indebtedness for the redemption of which the refunding bonds were issued.

SEC. 9. Each county, municipality and school district shall pay into the territorial treasury its *pro rata* of the costs and expenses incurred and paid by the Territory for the refunding, redeeming and payment of the indebtedness of said county, municipality or school district.

SEC. 10. This act shall take effect and be in force from and after its passage.

Approved March 19, 1891.

No. 33.

An act to provide for funding territorial indebtedness only incurred since December 31st, 1890, in accordance with an act of Congress entitled "An act approving, with amendments, the funding act of Arizona, approved June 25th, 1890," and approved August 3rd, 1894.

Be it enacted by the Legislative Assembly of the Territory of Arizona:

SEC. 1. That an act entitled "An act to amend section 15 of an act approving, with amendments, the funding act of Arizona, approved June 25th, 1890," and approved August 3rd, 1894, be and the same is hereby now re-enacted, as of the date of its approval, and the Territory of Arizona by this act ratifies and confirms the objects, purposes, and provisions thereof, and the loan commissioners of the Territory of Arizona, are hereby authorized and directed to provide for the liquidation, funding and payment of all territorial indebtedness, incurred since December 31st, 1890, for necessary and current expenses in carrying on the territorial government, and for all territorial indebtedness that may hereafter be incurred for the necessary and current expenses of carrying on the territorial government for the years ending December 31st, 1894, and December 31st, 1895, by the issuance of bonds of said Territory, as authorized by the acts of Congress, in relation thereto, making the interest thereon payable semi-annually in gold coin of the United States.

SEC. 2. The Territory of Arizona accepts the terms and conditions expressed in said act of Congress, for the liquidation, funding and redemption of said territorial indebtedness, and the method therein provided, for liquidating, funding and redeeming said indebtedness, shall apply and be the method employed and used in liquidating, funding and redeeming said indebtedness, and the said loan commissioners are hereby empowered and authorized to exchange territorial funding bonds for any of the indebtedness mentioned in section 1 of this act, or sell said bonds and apply

the proceeds thereof to the payment of said indebtedness, as provided by the said acts of Congress and the laws of the Territory of Arizona.

SEC. 3. This act shall take effect and be in force from and after its passage.

J. H. CARPENTER,
Speaker of the House.

A. J. DORAN,
President of the Council.

Approved this 19th day of March, 1895.

LOUIS C. HUGHES, *Governor.*

No. 78.

An act to limit the expense of the loan commission of the Territory of Arizona.

Be it enacted by the Legislative Assembly of the Territory of Arizona:

SECTION 1. That the loan commission of Arizona shall not exceed in expenses one and one-half per cent. (1½ %) of each loan negotiated by them in behalf of the Territory.

SEC. 2. The members of the loan commission shall receive no *per diem* for their services, and the secretary of the loan commission shall not receive a salary exceeding twenty-five dollars ($25.00) per month.

SEC. 3. All acts and parts of acts in conflict with this act are hereby repealed.

SEC. 4. This act shall take effect and be in force from and after its passage.

D. G. CHALMERS,
Speaker of the House.

FRED G. HUGHES,
President of the Council.

Approved March eighteenth, 1897.

B. J. FRANKLIN, *Governor.*

No. 32.

An act to abolish the loan commission and to repeal sundry laws relating thereto.

Be it enacted by the Legislative Assembly of the Territory of Arizona:

SECTION 1. That paragraph 2039, section 1, chapter 1, title 31, of the Revised Statutes of the Territory of Arizona; also that section 1 of act No. 79, Session Laws of the Sixteenth Legislative Assembly of the Territory of Arizona; also act No. 33 and act No. 74, Session Laws of the Eighteenth Legislative Assembly of the Territory of Arizona, are hereby repealed.

SEC. 2. This act shall take effect and be in force from and after its passage.

This bill having been returned by the governor, with his objections thereto, and, after reconsideration having passed both houses by a two-thirds vote of each house, has become a law this 13th day of March, A. D. 1899.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 388.

N. O. MURPHY, C. H. AKERS, AND J. W. VICKERS AND N. O. MURPHY, GOVERNOR; C. H. AKERS, SECRETARY, AND J. W. VICKERS, AUDITOR OF THE TERRITORY OF ARIZONA, CONSTITUTING THE BOARD OF COMMISSIONERS STYLED THE LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA, APPELLANTS,

vs.

JAMES L. UTTER AND GEORGE ALBRIGHT, WESLEY ALBRIGHT, AND WILLIAM H. McGINNIS, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF ELIZABETH B. VOORHIES, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLANTS.

Statement of the Case.

This is an appeal from the judgment of the supreme court of the Territory of Arizona against N. O. Murphy, governor of Arizona; C. H. Akers, secretary of the Territory,

and G. W. Vickers, auditor of the Territory, constituting the Board of Loan Commissioners of the Territory of Arizona, the successors in office to the respondents, B. J. Franklin, C. P. Leach, and C. N. Bruce and their successors in office as such Loan Commissioners, commanding them, upon the tender by the plaintiffs of $150,000 of the bonds of the county of Pima of the denomination of $1,000 each and bearing date on or about the first day of July, 1883, with the coupons then thereto attached, to make, issue, and deliver to the petitioners negotiable bonds of the Territory of Arizona, as provided in the act of Congress entitled "An act approving with amendments the funding act of Arizona," approved June 5, 1890; also the act of Congress entitled "An act to amend an act," and an act approving with amendments the funding act of Arizona approved June 25, 1890; approved July 13, 1892; also an act of Congress entitled "An act to amend section fifteen of an act approving with amendments funding act of Arizona," approved June 25, 1890; approved August 3, 1894; also an act of Congress entitled "An act amending and extending the provisions of an act of Congress entitled An act approving with amendments the funding act of Arizona," approved June 25, 1890, and the act amendatory thereof and supplemental thereto approved August 3, 1894; approved June 6, 1896; such bonds to be made, issued, and delivered to the petitioners or their attorney in exchange for the said 150 of the bonds of the county of Pima, as described in said petition, and for the accrued and unpaid interest thereon upon the surrender of said bonds and all unpaid coupons thereto attached.

This case was before this court under the style of Utter

et al., appellants, *vs.* Franklin *et al.*, as reported in 172 U. S., page 16, on a petition for a writ of mandamus to compel the defendants therein, who were then the respective governor, auditor, and secretary of the Territory, and who by virtue of their offices constitute the Loan Commissioners of the Territory of Arizona, to issue certain bonds in exchange for bonds issued by the county of Pima in aid of the Arizona Narrow Gauge Railroad Compay. The aggregate amount of the principal and interest on the bonds sought to be funded was at that time $289,964.50.

This case on the original petition was decided on the demurrer to the petition in favor of the Loan Commission and against the petitioners by the supreme court of the Territory of Arizona, and upon appeal to this court was reversed and remanded to the court below with direction to proceed in said cause not inconsistent with the provisions of the opinion of this court. The record being returned to the supreme court of the Territory, the Loan Commission were allowed to make answer setting up matters of defense to the petition. The case was then tried before the supreme court of the Territory and the judgment rendered as above stated.

The statement of facts made by the supreme court of the Territory are fully set out in the record at pages 91 to 109, and we do not deem it necessary to make any further statement of the facts in the case for the purpose of presenting the errors here relied upon for a reversal of this judgment. We urge especially the following, which are presented in the assignment of errors, as reasons why the judgment of the lower court should have been in favor of the present Loan Commission and why this court should so hold:

First. The supreme court of Arizona erred in rendering this judgment, for the reason that the original defendant, Benjamin J. Franklin, had departed this life long before this judgment was rendered, and the other defendants, C. N. Bruce and J. C. Leach, had long since ceased to be the secretary and auditor, respectively, of the Territory of Arizona, and therefore not the Loan Commission of said Territory.

Second. The court erred in holding that the cause of action survived against N. O. Murphy, C. H. Akers, and George W. Vickers, who were then the governor, secretary, and auditor of the Territory of Arizona and then the Loan Commission of said Territory, for the reason that the writ cannot run against them as the successors of Franklin, Leach, and Bruce, and for the further reason that no demand was ever made upon them to fund the bonds in question.

ARGUMENT.

The errors here assigned may be considered together. It will be observed from reading the judgment of the supreme court of the Territory that this writ is made exclusively against the individuals in the writ mentioned, viz., N. O. Murphy, C. H. Akers, and George W. Vickers. The writ is not made or addressed, and neither could it be, to the office of the Loan Commission, but it runs against the commands of the individuals in person who by law comprise that commission. The contention of the individuals composing this Loan Commission is that the rule as laid down by this court as governing public officers of the United States should be applied to them. This board is in no sense

a municipal board. While it is true it is a continuing board, it is not true that it is a continuing corporation. It stands in the same relation to the Federal government, so far as its duties are concerned, under the present law, at the time this action was brought, as any of the Cabinet Officers of the United States. The governor and secretary, who form the chief officers of the board, are both United States officers, both being appointed by the President and confirmed by the Senate, and hold their tenure of office for the term mentioned in their commission, subject at all times to removal by the President at his will and discretion, and may at any time that suits their convenience or pleasure resign their office. The Board of Loan Commissioners, as said before, is not a corporation. It is not capable of suing or being sued as provided for corporations any more than the office of the Secretary of the Interior or of the Secretary of War. Their duties as commissioners are simply incident to the office of governor, secretary, and auditor of the Territory.

While it is true that this Loan Commission was originally created by an act of the territorial legislature known as chapter 31 of the Laws of 1887, paragraphs 29–30, section 1, of which reads as follows:

"For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the Territory of Arizona, and such future indebtedness as may be, or is now authorized by law, the governor of said Territory together with the territorial auditor and the territorial secretary, and their successors in office shall constitute the Board of Commissioners to be Loan Commissioners of the Territory of Arizona and shall have and exercise the powers and duties hereinafter provided."

The act of Congress approved June 25, 1890, re-enacts this statute verbatim. And while the commission consists of the governor, secretary, and auditor, and their successors in office, the writ in this case issued directly at the officers themselves, and to their successors in office.

It has been held by repeated decisions of this court that a petition for a writ of mandamus to a public officer of the United States abates by his resignation of his office. This rule has been so uniformly followed by this court that it is only necessary to call the attention of the court to its statement of this proposition in the case of Warner Valley Stock Company *vs.* Smith, 165 U. S., on page 31, and cases there cited by the court.

This court, in the case above cited, used the following language, which seems to us pertinent to the present case:

"The office of a writ of mandamus is to compel the performance of a duty resting upon the person to whom it is sent.

"If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is, therefore, in substance a personal action, and rests upon the avowed and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right. Hence it is an imperative rule that previous to making application for a writ to command the performance of any particular act, an express and distinct demand or request to perform it must have been made by the relator or prosecutor upon the defendant; and it must appear that the refusal to comply with such demand was either in direct terms or by conduct from which a refusal can be conclusively referred. Thus it is the

personal default of the defendant that warrants impetration of the writ; and if a peremptory mandamus be awarded, the costs must fall upon the defendant. It necessarily follows from this that on the death or retirement from office of the original defendant the writ must abate, in the absence of any statutory provision to the contrary. When the personal duty exists only so long as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased, and if a successor in office may be mulcted in costs for the default of his predecessor, without any delinquency of his own. Besides, were a demand made upon him he might discharge the duty and render the interpretation of the court unnecessary. At all events, he is not in privity with his predecessors, much less is he his predecessor's personal representative" (17 Wall., 607, 608 and 165 U. S., 32).

The case of a public officer of the United States differs in this respect from that of a municipal board, which is a continuing corporation (although its individual members may be changed) and to which in its corporate capacity a writ of mandamus may be directed. As was said in Commissioners *vs.* Sewell, 99 U. S., 627:

"The cases in which it has been held by this court that an abatement takes place by the expiration of the term of office have been those of officers of the Government, whose alleged delinquency was personal and did not involve any charge against the Government whose officers they were. A proceeding against the Government would not lie" (103 U. S., 484, 485).

The same is equally true as to the Territory. No action can be maintained against it.

Precisely the same thing is true in the present case as was

true in Warren Valley Stock Co. *vs.* Smith. Both are continuing offices, viz., the office of Secretary of the Interior and the office of Loan Commissioner; the duties of each are alike performed by United States officers appointed by the President and confirmed by the United States Senate, without which no duty could be created and no act performed. The case at bar is quite different from the case of Commissioners *vs.* Sewell, 99 U. S., 624. In that case the county was the corporation and the commissioners but its officers, and the writ ran against the corporation, and whoever the officers were they should perform the duty, and the costs would go against the corporation and not against the officers. In the present case the costs cannot go against the Territory or any one else except N. O. Murphy, C. H. Akers, and George W. Vickers, and that for the sole reason of a violation of duty by Franklin, Bruce, and Leach, their predecessors in office, this exact question was passed on by this court in the case of Warren Valley Stock Co. *vs.* Smith, 165 U. S., 30 or 32, and there held that the successor in office, being a United States officer, could not be so held, and that the writ abated. We therefore respectfully submit that this case should be governed by the same rule, and that this action should abate.

C. F. AINSWORTH,
Attorney General of Arizona.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 338.

N. O. MURPHY, C. H. AKERS, AND J. W. VICKERS, AND N. O. MURPHY, GOVERNOR; C. H. AKERS, SECRETARY, AND J. W. VICKERS, AUDITOR OF THE TERRITORY OF ARIZONA, CONSTITUTING THE BOARD OF COMMISSIONERS STYLED THE LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA, APPELLANTS,

vs.

JAMES L. UTTER AND GEORGE ALBRIGHT, WESLEY ALBRIGHT, AND WILLIAM H. McGINNIS, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF ELIZABETH B. VOORHEES, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

ADDITIONAL BRIEF FOR APPELLANTS.

A main contention for the petitioners herein is that the act of Congress of June 6, 1896, is, as to the bonds involved herein, mandatory as to funding and not permissive merely,

as respondents maintain. In construing this act and attempting to meet some points in the brief of petitioners, it is to be observed:

I.

This act should be considered *in pari materia* with the acts which it amends.

In terms it amends the provisions of the acts of Congress of June 25, 1890, and August 3, 1894, authorizing the funding of certain indebtedness of the Territory of Arizona.

Referring to the act of August 3, 1894, it is seen that it amends only paragraph 2252 (section 15) of the act of June 25, 1890, which paragraph permits the funding of certain indebtedness in excess of the limitations of the Harrison act. This is the sole subject touched on by the amendment.

This court in its opinion in the Schuerman *vs.* Arizona case (decided March 3, 1902) cites with approval the language of the Supreme Court of Arizona in that case, where, construing these several acts, it is said:

"It is to be noted that, in both the acts referred to, the only limitation imposed had reference to the class of obligations which were permitted to be funded, and did not in any manner restrict the territorial officers in the method of their procedure previously prescribed by the territorial law, or limit the time within which the acts of funding, by the sale and disposition of bonds, might lawfully be done. Bearing in mind the remedial character of this legislation, and reading the act of June 6, 1896, in the light of the previous congressional enactment upon the same subject-matter, we construe the former act to express only what obviously appears to be

the congressional intent, to extend and enlarge the class of obligations which may be funded."

And this court said in Utter *vs.* Franklin, 172 U. S., 416, construing this act of June 6, 1896:

"Its evident purpose was to authorize the funding of all outstanding bonds," etc. * * * "The second section deals with the original bonds which had not been theretofore funded, and provides that all such as had been theretofore issued under the authority of the legislature, and which by the first section were authorized to be funded, should be confirmed, approved and validated, and might be funded until January 1, 1897."

II.

The act of June 6, 1896, being amendatory of the act of July 25, 1890, must be considered as part of that act, and therefore, so far as the funding of obligations is concerned, as "subject to future territorial legislation," just as the act of July 25, 1890, is expressly stated to be.

Congress, in approving and confirming the funding act of Arizona of 1887, left it "subject to future territorial legislation." It would seem that it would have been subject to such legislation without this statement by Congress, but as indicating the fact that, as the act had emanated from the Arizona legislature, it was to remain under its control, Congress expressly so stated. What is the construction to be given to these words? To what legislation was this territorial act, which remained a territorial act after its approval by Congress, to be subject? The answer seems to be, to any future territorial legislation. It would seem to be manifest, and we

so submit, that this funding act of 1887 remained, after its approval, subject to territorial legislation just as fully as before it was approved and confirmed. Prior to the approval of the territorial act by Congress, as a matter of course, the territory had the absolute power to abolish the commission which it had created. Congress in approving the act did not take away any of the powers of the territory. On the contrary, it enlarged these powers as to certain indebtedness which might be funded. By the organic law, which provides that the power of the legislature of Arizona shall extend "to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States," the territory had the power to create and also to abolish a loan commission. In the act of July 30, 1886, it was expressly stated that nothing therein should be construed to prohibit the refunding by the territory of any existing indebtedness. Congress thus continued to leave with the territory plenary power as to funding. The territory therefore had this power when it passed the funding act of 1887. This power was left with it after the act was approved by Congress in 1890. "Subject to future territorial legislation" would therefore appear to mean, not only in the unrestricted application of the words themselves, but also in view of the powers of the legislature, the same unrestricted power of legislation which the territory had before the approval by Congress of the territorial act of 1887, which would include the power to abolish the commission.

III.

This construction will be seen, so we think, to be in harmony with the policy as to territorial government announced by this court in Clinton *vs.* Englebrecht, 13 Wall., 434, and other cases quoted in our main brief and again as follows:

"The theory upon which the various governments for portions of the territory of the United States have been organized has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority, and with certain fundamental principles established by Congress."

One of these powers, consistent with what seems to have been adopted as a fundamental principle, is the power of funding. This seems to be, and always to have been, in the contemplation of Congress, a matter of local self-government. As above indicated, the territorial funding act emanated first from the legislature of Arizona under the powers expressly given to it by Congress. It was a thought or purpose which had no place in the mind of Congress until presented to that body by the people of Arizona through its chosen body, the legislature. Congress by the Harrison act having left the subject of funding entirely to the legislatures of the territories, it seems clear that no funding law would have ever had an existence as an independent creation by Congress. Congress has never passed such a law, nor could it do so without a reversal of that which has always been its policy. The approval by Congress of the funding act of 1887 was a positive assurance that such law was within the

power of the Arizona legislature to pass, and we submit that it is a necessary conclusion that the body which had power to create the commission had also the power to abolish it.

As was said by Chief Justice Marshall in U. S. *vs.* Fisher, 2 Cranch, 358, 390:

"Where fundamental principles are overthrown, where the general system of laws is departed from, the legislative intent must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects.

"The intention of the legislature in enacting a particular statute is not to be ascertained by interpreting the statute by itself alone, and according to the mere literal meaning of its words. Every statute must be construed in connection with the whole system of which it forms a part and in the light of the common law and of previous statutes upon the same subject. And the legislature is not to be lightly presumed to have intended to introduce a fundamental change in long-established principles of law. * * * It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words simply because, in their widest, and perhaps natural, sense they have that meaning, would be to give them a meaning in which they are not really used."

Black on Int. of Law, 110, and cases cited.

IV.

These views are, it is believed, fully supported by the facts as appearing in the memorial of the Arizona legislature, in response to which, as stated by this court in the Schuerman case, the second section of the act of June 6,

1896, was passed. This memorial recites, in effect, that certain bonds had been issued in good faith and were held by *bona fide* holders; that under the inducements held out in the issuance of these bonds large sums of money had been invested; that the validity of the bonds had been recognized by the payment of interest, but that, owing to the decision of this court in Lewis *vs.* Pima County, there was a doubt as to the validity of the bonds, and therefore the legislature "adopted a memorial asking Congress to pass such curative legislation in regard to such bonds as would protect the bondholders, when such bonds had been issued under the authority of the acts of the territorial legislature. It was, therefore, the desire of the territory of Arizona to have the bonds validated, and that they should be paid and to pay them" (Opinion of this court in the Schuerman case).

What was the mischief and the sole mischief which Congress was requested to remedy? Evidently it was only the lack of authority in the issuance of the bonds. If this defect were cured as prayed for by the Arizona legislature, the bonds would be validated and legal in every respect. With this defect removed, they would be on the same footing as indebtedness the validity of which had never been questioned, and might be funded or not, as seemed best to the Arizona legislature. It is not to be supposed that the act of June 6, 1896, would have been passed except for the memorial of the Arizona legislature. Considering the object of this memorial as above stated and the fact that the act of June 6, 1896, was passed to remedy the mischief suggested in the memorial, it seems wholly unwarranted to argue that Congress had any object in view except to cure the defect and validate the bonds referred to. There is, so

we submit, absolutely nothing in the act itself or the facts occasioning the passage of the act to warrant the argument that Congress intended to change its fixed policy of leaving to the territories the right to fund or not to fund their indebtedness.

It was suggested by appellees at the argument that at the time of the passage of this act of June 6, 1896, there were outstanding bonds with large accumulations of unpaid interest, and that for this reason it must be assumed that Congress made imperative the funding of such obligations. But with profound respect we submit that such an assumption is at variance with the facts as presented in the memorial from Arizona, the prominent feature of which is the assertion that the validity of the bonds which it was desired to validate had been recognized by the payment of interest. As hereinbefore stated, all that was needed to protect the bondholders was to cure the defect as to the lack of authority in issuing the bonds. The funding act of 1887 was passed long after the issuance of any of the bonds referred to in the memorial, and at the time such bonds were issued there was no funding law of any kind. The remedy of funding was therefore no part of the original contract. No consideration passed from the bondholders by virtue of which they could claim that they had a vested right to fund. Whether or not it was best to provide or continue a commission for the funding of bonds was, we have urged, a question of local financial policy to be determined by the Arizona legislature, and in the act of June 6, 1896, as though to emphasize the fact that the whole question of the payment of these bonds (whether by funding or otherwise) was one for the territory to deal with, Congress expressly provided that nothing

should be so construed as to make the Government of the United States "responsible for the payment of any of the bonds, warrants, or other evidences of indebtedness by this act approved, confirmed and made valid, and authorized to be funded."

V.

But if we were left merely to a cold, technical construction of the act of June 6, 1896, it would seem to be clear that, notwithstanding the use of the word "shall," the act is permissive only and not mandatory. However broad some of the expressions of a statute may be, yet if, on examination, it clearly appears that they are and were intended to be limited by other provisions of the same or other acts on the same subject, it cannot be improper to restrain them accordingly (The Elizabeth, 1 Paine, U. S., 11).

General words and phrases, however wide and comprehensive in their literal sense, must be construed as strictly limited to the immediate objects of the act and as not altering the general principles of the law.

River Wear Coms. *vs.* Adamson, 1 Q. B. Div., 546; 2 App. Cases, 743.

Under this familiar principle the first section of the act of June 6, 1896, providing that certain bonds, etc., shall be funded, is limited and the words defined by the second section of the act which provides that bonds "as hereinbefore authorized to be funded are hereby confirmed, approved and validated, and may be funded as in this act provided until January 1st, 1897," and by the last two lines of the act which refer to the said bonds, etc., "by this act approved, confirmed and made valid, and authorized to be funded."

"Shall" ought undoubtedly to be construed as meaning "must" for the purpose of sustaining or enforcing an existing right, but it need not be for creating a new one.

West Wisconsin R'y Co. *vs.* Foley, 94 U. S., 100, 103.

As against the Government the word "shall," when used in statutes, is to be construed as "may," unless a contrary intention is manifest.

Railroad Co. *vs.* Hecht, 95 U. S., 168, 170.

It is a well-settled rule that the word "shall" may receive a permissive rather than an imperative interpretation when necessary to carry out the true intent of the provision in which such word is found.

Endlich Int. Stat., sec. 316.
Potter's Dwar. Stat., 220.
Sedgwick Stat. & Const. Law, 438, 439.

Statutes are mandatory where the public interest and rights are concerned, and where the public or third persons have a claim *de jure* that the power be exercised.

Blake *vs.* Portsmouth, etc., R. R., 39 N. H., 435.
The Newburgh Turnpike Coal *vs.* Miller, 5 John Ch. R., 112.

In regard to funding, the Arizona legislature has declared by the repeal of the Loan Commission that the public interests do not demand the funding of the bonds, and we have attempted to show in our main brief that the bondholders have no claim *de jure* that the power be exercised. As to them the offer is a pure gratuity without any consid-

eration on the part of the bondholders, and might therefore be withdrawn even under the express language of this court in the case of Memphis *vs.* U. S., 97 U. S., 293, cited in the brief for appellees on page 100, and relied on as being on all-fours with the present case. We must submit our respectful opinion that it is wholly different from the case at bar, and in support of this opinion of ours have to say, in brief, that the court stated in this Memphis *vs.* U. S. case that "we think the relator had acquired a vested right by his judgment," etc.; but the court goes on to say, "We do not deny that it is competent for a legislature to repeal an act, which when it was passed was a mere gratuity, if while it was in existence no vested rights have been acquired under it or in virtue of it."

The opinion of this court in Durkee *vs.* Board of Liquidation, 103 U. S., 646, cited on page 60 of our main brief, is absolute to the effect that where no consideration passes from the holder of the bonds no vested right is acquired to fund them, and the offer may be withdrawn.

The radical difference, as it occurs to us, between the case cited by appellees and the present case is that in the one a vested right had been acquired, and in the present case there was no vested right.

The Loan Commission having been abolished without any reservation as to pending proceedings and no vested rights having been acquired by the bondholders, the effect of the repealing act was to take away the jurisdiction of the lower court to proceed further in this case which was founded upon the act repealed. (See *In re* Hall, petitioner 167 U. S., 38, and other cases cited on page 65 of our main brief.) As, at the time of the judgment herein appealed

from, there were no officers constituting the Loan Commission against whom a writ could run, it is submitted that this action abated, and that the judgment below was erroneous, and that this case should be reversed and remanded, with directions to the lower court to dismiss the petition or to enter judgment for defendants.

Respectfully submitted.

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Of Counsel for Appellants.